Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

RUSSELL ALLEN NORDYKE and SALLIE ANN NORDYKE, dba TS TRADE SHOWS, JESS B. GUY, DUANE DARR, WILLIAM J. JONES, DARYL N. DAVIS,, TASIANA WERTYSCHYN, JEAN LEE, TODD BALTES, DENNIS BLAIR, R. L. (Bob) ADAMS, ROGER BAKER, MIKE FOURNIER and VIRGIL McVICKER,

Petitioners,

vs.

MARY V. KING, GAIL STEELE, WILMA CHAN, KEITH CARSON, SCOTT HAGGERTY, The COUNTY OF ALAMEDA, and The COUNTY OF ALAMEDA BOARD OF SUPERVISORS,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Do individuals have standing to litigate any rights under the Second Amendment to the United States Constitution?

2. Can the individual rights guaranteed by the Second Amendment to the United States Constitution be enforced against infringements by state and local governments?

3. Does a county ordinance prohibiting the possession of firearms at gun shows held at a county fairgrounds, in contexts that involve core political, educational and social speech, abridge rights under the First Amendment to the United States Constitution?

STATEMENT PURSUANT TO RULES 14.1(b) & 29.6

All parties are set forth in the caption.

T S TRADE SHOWS is the business name used by RUSSELL and SALLIE NORDYKE to conduct business as gun show promoters throughout Northern and Central California. The business is wholly owned by the Nordykes.

Petitioner VIRGIL McVICKER is president of the MADISON SOCIETY, a Nevada Corporation with its registered place of business in Carson City, Nevada. The Madison Society has chapters throughout California. The society is a membership organization whose purpose is preserving and protecting the legal and constitutional right to keep and bear arms for its members and all responsible law-abiding citizens. It is not a publicly traded corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The district court's order (per Jenkins, M.J.) denying petitioner's motion for preliminary injunction is unpublished, but is set forth in the Petitioners' Appendix at page 46.

The court of appeals' order certifying questions raised in this case to the California Supreme Court is published at 229 F.3d 1266 (9th Cir. 2000). The order is set forth in the Petitioners' Appendix at page 74.

The answer to the certified question by the California Supreme Court is published at 27 Cal.4th 875, 118 Cal Rptr 2d 761 (Cal. 2002). The opinion is set forth in the Petitioners' Appendix at 83.

The court of appeals' opinion (per Alarcon, O'Scannlain and Gould) is published at 319 F.3d 1185. The opinion is set forth in the Petitioners' Appendix 1.

The orders denying rehearing and rehearing en banc are published at 364 F.3d 1025 (9th Cir. 2004). The opinion is set forth in the Petitioners' Appendix at 22.

STATEMENT OF JURISDICTION

The court of appeals entered its opinion and order on February 18, 2003, and denied rehearing and rehearing en banc on April 5, 2004.

Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS *INVOLVED*

The First Amendment to the United States Constitution, the Second Amendment to the United States Constitution, and the Fourteenth Amendment to the United States Constitution are implicated by the facts and law of this case.

STATEMENT OF THE CASE

Russell Nordyke and Sallie Nordyke (dba TS Trade Shows) ("Nordyke") have been promoting gun shows at the Alameda County Fairgrounds since 1991. The Fairgrounds are located on unincorporated county land in the City of Pleasanton, California. The various other plaintiffs and exhibitors attending the shows include sellers of antique (pre-1898) firearms, modern firearms, ammunition, Old West memorabilia, and outdoor clothing. In addition, the show hosts educational workshops, issue groups, and political organizations.

Many activities at gun shows involve firearms being exhibited not for sale, but integral to core non-commercial First Amendment activities. Those activities include, but are not limited to: (1) displays by historical reenactors, (2) firearms used for safety instruction, (3) the exhibition of guns that are art objects or collector items in an of themselves, without regard to their status as weapons, and (4) the display of guns used in raffles to raise funds for political action groups.

In August 1999, Alameda County passed an ordinance making illegal the possession of firearms on County property. "Every person who brings onto or possesses on county property a firearm, loaded or unloaded, or ammunition for a firearm is guilty of a misdemeanor." Alameda County Ordinance § 9.12.120(b). [See Petitioner's Appendix at 94 (hereafter: Pet. App.)] The court of appeals found: "The Ordinance would forbid the presence of firearms at gun shows, such as Nordyke's, held at the Fairgrounds. Practically, the Ordinance makes it unlikely that a gun show could profitably be held there." [See: Pet. App. at 77; *Nordyke v. King*, 229 F.3d 1266, 1268]

The California Supreme Court made a stronger finding: "[T]he effect on the Nordykes of the Ordinance banning guns on county property is to make gun shows on such property virtually impossible." [See: Pet. App. at 86; *Nordyke v. King*, 27 Cal. 4th 875, 882, 118 Cal Rptr 2d 761, 766 (Cal. 2002)] [emphasis added]

Seeking to prevent the Ordinance's enforcement, Nordyke brought suit against the County in the United States District Court for the Northern District of California. Nordyke applied for injunctive relief. The district judge treated the application as one for a preliminary injunction and denied it. He noted that under either test for a preliminary injunction, a litigant must at least show a fair chance of success on the merits and ruled that Nordyke had failed to do so. Having concluded that Nordyke had little chance of success on the merits, he did not reach the balance of the hardships determination. Nordyke then filed a timely interlocutory appeal in Court of Appeals for the Ninth Circuit.

The appellate court certified Nordyke's preemption claim to the California Supreme Court asking the following question: "Does state law regulating the possession of firearms and gun shows preempt a municipal ordinance prohibiting gun possession on county property?" [See Pet. App. at 76; *Nordyke v. King*, 229 F.3d at 1267 (9th Cir. 2000)]

The California Supreme Court granted certification and "conclud[ed] that the municipal ordinance in question, insofar as it concerns gun shows, is not preempted. Other aspects of the ordinance may be partially preempted, but we need not address these aspects in this case." The California Supreme Court went on to hold: "whether or not the Ordinance is partially preempted, Alameda County has the authority to prohibit the operation of gun shows held on its property, and, at least to that extent, may ban possession of guns on its property." [See Pet. App. 83, 89; *Nordyke v. King*, 27 Cal. 4th at 880, 885; 118 Cal. Rptr. 2d at 764, 768 (Cal. 2002)]

Subsequent to the California Supreme Court's answer to the certified question, the Ninth Circuit panel hearing the case instructed the parties to brief the effect of the holding of the certified question on the remaining issues pending before that panel. It was during this time period that the Nordykes sought permission to brief Second Amendment issues.

Although not plead in the complaint, nor addressed in the Nordykes' motion for preliminary injunction, the issue was fairly before the appellate court. The district court had dealt with the Second Amendment issue *sua sponte* in the November 3, 1999 order denying the preliminary injunction. [See Pet. App. 62, 63]:

> An initial point is that the Second Amendment, unlike most other provisions of the Bill of Rights, has never been incorporated against the states. In the absence of incorporation, the Second Amendment constraints federal action, and not state action. Presser v. Illinois, 116 U.S. 252 (1886). Therefore, the substantive protections afforded by the Second Amendment are not relevant to the Court's review of state law, such as the ordinance at issue here. While plaintiffs do not assert a second amendment right to bear arms, they could not, for individuals lack standing to assert Second amendment claims. In Hickman v. Block, 81 F.3d 98, 100-01 (9th Cir. 1996), cert. denied, 519 U.S. 912 (1996), the Ninth Circuit stated that "no individual has ever succeeded in demonstrating such injury in federal court." Id. at 101. The court explained that "because the Second Amendment guarantees the right of the states to maintain armed militia, the states alone stand in the position to show legal injury when this right is infringed." Id. at 102. Therefore,

> under current law, only states are proper Second Amendment plaintiffs, and only federal authorities are proper Second Amendment defendants.
>
> Given the nonavailability of Second Amendment protections to plaintiffs, the baseline considerations for preemption are as follows. [...]

This statement by the trial court, taken togther with a recent decision upholding an individual's right to keep and bear arms out of the Fifth Circuit Court of Appeals, *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001), and a change in the United States Justice Department's position on the Second Amendment[1] were the reasons articulated by the Ninth Circuit panel in calling for briefing on Second Amendment issues. [See Pet. App. at 3; *Nordyke v. King*, 319 F.3d 1185, 1189-90 (9th Cir. 2003)]

Thereafter, the Ninth Circuit panel affirmed the decision of the district court. The Nordykes' First Amendment "facial challenge" to the ordinance was found wanting. However, the panel did note that its holding did not foreclose a future "as applied" challenge to the Ordinance. [See Pet. App. at 6; *Nordyke v. King*, 319 F.3d at 1190, n.3]

The Ninth Circuit had previously considered Second Amendment standing issues in the prior case of *Hickman v. Block*, 81 F.3d 98 (9th Cir.1996). *Hickman*, found that individuals lacked standing to raise Second Amendment issues; and the *Nordyke* Ninth Circuit panel felt that it was foreclosed from reconsidering the issue.

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[1] See: Solicitor General's Opposition to Petition for Certiorari in *United States v. Emerson*, 122 S.Ct. 2362; 153 L.Ed. 2d 184, at 19 n.3, available at http://www.usdoj.gov/osg/briefs/2001/0responses/2001-8780.resp.pdf.

An intra-circuit conflict ensued. [Pet. App. at 9; *Nordyke v. King*, 319 F.3d at 1192 fn. 4 (9th Cir. 2003)] :

> n4 We should note in passing that in *Silveira v. Lockyer*, 312 F.3d 1052 (9th Cir. 2002), another panel took it upon itself to review the constitutional protections afforded by the Second Amendment even though that panel was also bound by our court's holding in *Hickman*. The panel in *Silveira* concluded that analysis of the text and historical record led it to the conclusion that the collective view of the Second Amendment is correct and that individual plaintiffs lack standing to sue.
>
> However, we feel that the *Silveira* panel's exposition of the conflicting interpretations of the Second Amendment was both unpersuasive and, even more importantly, unnecessary. We agree with the concurring opinion in *Silveira*: "[W]e are bound by the *Hickman* decision, and resolution of the Second Amendment issue before the court today is simple: plaintiffs lack standing to sue for Second Amendment violations because the Second Amendment guarantees a collective, not an individual, right." *Silveira v. Lockyer*, 312 F.3d 1094 (9th Cir. 2002) (Magill, J., concurring). This represents the essential holding of *Hickman* and is the binding law of this circuit. [...]
>
> [...] Therefore, despite the burgeoning legal scholarship supporting the "individual rights" theory as well as the Fifth Circuit's holding in *Emerson*, the *Silveira* panel's decision to re-examine the scope and purpose of the Second Amendment was improper. Because "only the court sitting en banc may overrule a prior

> decision of the court," *Morton v. De Oliveira, 984 F.2d 289, 292 (9th Cir. 1993)*, the *Silveira* panel was bound by *Hickman*, and its rather lengthy re-consideration of *Hickman* was neither warranted nor constitutes the binding law of this circuit. Accordingly, we ignore the *Silveira* panel's unnecessary historical disquisition as the dicta that it is and consider ourselves bound only by the framework set forth in *Hickman*.

Judge Ronald M. Gould's special concurrence called for *Hickman* to be discarded by the court sitting *en banc*, or rejected by the United States Supreme Court if this case is granted certiorari. [See Pet. App. at 13; *Nordyke v. King*, 319 F.3d at 1194 (9th Cir. 2003)]

The Nordykes petitioned for rehearing and rehearing *en banc*. The Ninth Circuit stayed consideration of the petition while the case of *Silveira v. Lockyer*, 312 F.3d 1052 (9th Cir. 2002), reh'g en banc denied, 328 F.3d 567 (9th Cir. 2003), cert. denied, 124 S. Ct. 803 (2003) was pending before the United States Supreme Court on a petition for certiorari.

After the *Silveira* petition was denied, the original panel of judges voted to deny rehearing, but voted to grant the petition for rehearing *en banc*. The panel requested a vote of the full court. A majority of the judges sitting on the Ninth Circuit failed to vote in favor of the petition.

The order denying rehearing and rehearing *en banc* was filed April 5, 2004. A 35 page concurring and dissenting opinion was filed with the order. [See Pet. App. at 22; *Nordyke v. King*, 364 F.3d 1025 (9th Cir. 2004)]

The various opinions in this case indicate that Petitioners should prevail on the Second Amendment standing issues. "And if we were writing on a blank slate, we may be inclined to follow the approach of the Fifth Circuit in *Emerson*." [See Pet. App. at 8; *Nordyke v. King*, 319 F.3d at 1191]

REASONS FOR GRANTING CERTIORARI ON SECOND AMENDMENT ISSUES

Every one of the Ninth Circuit judges who authored an opinion in this case regarding the Second Amendment, have suggested that Petitioners should have won. Petitioners' obstacle is the poorly reasoned case of *Hickman v. Block*, 81 F.3d 98 (9th Cir.1996). *Hickman* held that individuals lacked standing to litigate any rights under the Second Amendment. A later case, *Silveira v. Lockyer* 312 F.3d 1052 (9th Cir. 2002), reh'g en banc denied, 328 F.3d 567 (9th Cir. 2003), cert. denied, 124 S. Ct. 803 (2003), tried to shore up the defective reasoning in *Hickman*.

Petitioners are cognizant of this Court's recent denial of a petition for certiorari from this same circuit regarding Second Amendment standing issues. See *Silveira v. Lockyer* 312 F.3d 1052 (9th Cir. 2002), reh'g en banc denied, 328 F.3d 567 (9th Cir. 2003), cert. denied, 124 S. Ct. 803, 157 L. Ed. 2d 693 (2003). However, Judge KLEINFELD distinguished *Nordyke* from *Silveira* in his dissent from the denial of the petition for rehearing *en banc.* [See Pet. App. at 24 *et seq.*; *Nordyke v. King*, 364 F.3d at 1026 *et seq.*]:

> Whether the Second Amendment guarantees an individual right is more likely to affect the outcome in this case than in *Silveira*. In *Silveira*, the challenge was to California's ban on assault weapons. Reasonable regulation of the individual right guaranteed by the Second Amendment might well have led to the same result, no relief, as the result reached by the panel using the "no individual right" argument. In this case, by contrast, the result might well have been different if we had not erased the Second Amendment. The ordinance at issue, subject to narrow exceptions, criminalizes any and all possession of firearms on county

> property. The case before the panel was about apparently law-abiding persons wanting to hold a gun show at a fairgrounds.

Also instructive is Judge Gould's dissent from the denial of *en banc* rehearing. [Pet. App. at 26; Nordyke Id. at 1027]:

> I dissent with recognition that we only recently denied en banc review in a case presenting a similar issue on the scope of the Second Amendment right to keep and bear arms. Silveira v. Lockyer, 312 F.3d 1052 (9th Cir. 2002), reh'g en banc denied, 328 F.3d 567 (9th Cir. 2003), cert. denied, 124 S. Ct. 803 (2003). However, Nordyke differs from Silveira, and is more appropriate for en banc reconsideration of the holding in Hickman. In contrast to Silveira, which involved a challenge to a California law restricting the possession, use, and transfer of assault weapons, 312 F.3d at 1056, a provocative issue, appellants in Nordyke challenged a local ordinance prohibiting the possession of all firearms on county property, which had the effect of foreclosing a traditional gun show. Some may consider that the regulation of assault weapons may implicate too many difficult considerations beyond that of whether the Second Amendment confers an individual or collective right. The ordinance at issue in Nordyke, if it must be tested in light of an individual Second Amendment right, will not raise the same concerns. If the Second Amendment confers an individual right, then the Nordyke gun possession ban presents a better context in which our court might have assessed the constitutionally permissible bounds of gun regulation.

The strongest reasons for granting certiorari are set forth in:

- Judge Gould's specially concurring opinion in Nordyke v. King, 319 F.3d at 1192 *et seq.* (9th Cir. 2003); Pet. App. at 10 *et seq.*
- Judge Kleinfeld's dissenting opinion from the denial of rehearing *en banc* in Nordyke v. King, 364 F.3d 1025 *et seq.* (9th Cir. 2004); Pet. App. at 23 *et. seq.*
- Judge Gould's dissenting opinion from the denial of rehearing *en banc* in Nordyke v. King, 364 F.3d 1026 *et seq.* (9th Cir. 2004); Pet. App. at 24 *et. seq.*
- All of the dissenting opinions from the denial of rehearing *en banc* in Silveira v. Lockyer, 328 F.3d at 568 *et seq.* (9th Cir. 2003), cert. denied, 124 S. Ct. 803; 157 L. Ed. 2d 693 (2003).

IMPORTANCE OF THE ISSUE

The state of law in the Ninth Circuit is best summed up in Judge Kleinfeld's dissent from denial of rehearing *en banc* :

> Our court has erased 10% of the Bill of Rights for 20% of the American people. No liberties are safe if courts can so easily erase them, and no lover of liberty can be confident that an important right will never become so disfavored in popular or elite opinion as to be vulnerable to being discarded like the Second Amendment.
>
> I have spelled out in great detail why our court's view of the Second Amendment is indefensible, in my dissent from denial of rehearing en banc in Silveira v. Lockyer. n1 Judge Gould has graciously noted some of the points in that dissent, and I will not restate them here.

> n1 Silveira v. Lockyer, 328 F.3d 567, 570 (9th Cir. 2003) (Kleinfeld, J., dissenting from denial of rehearing en banc).

[...] Our court and the Fifth Circuit take opposite views. In *United States v. Emerson*, the Fifth Circuit reads the Second Amendment to establish an individual right to keep and bear arms. n2 Our court reads it not to. Our court takes what to me is a position verging on droll legal humor, that the right is a "collective" right belonging to state government, meaning that it is enforceable only by the state, even when the state is the violator.

> n2 *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001)

Some people think that the Second Amendment is an outdated relic of an earlier time. Doubtless some also think that constitutional protections of other rights are outdated relics of earlier times. We The People own those rights regardless, unless and until We The People repeal them. For those who believe it to be outdated, the Second Amendment provides a good test of whether their allegiance is really to the Constitution of the United States, or only to their preferences in public policies and audiences. The Constitution is law, not vague aspirations, and we are obligated to protect, defend, and apply it. If the Second Amendment were truly an outdated relic, the Constitution provides a method for repeal. The Constitution does not furnish the federal courts with an eraser.

KLEINFELD, Dissent from denial of rehearing *en banc* Nordyke v. King, 364 F.3d at 1025 Pet. App. at 23 *et seq.*

Petitioners contend that every law abiding, responsible adult has the right to acquire and possess firearms. That the question is one of major importance should be obvious. In his specially concurring opinion Judge Gould found that the individual rights version of: "The Second Amendment serves at least the following two key purposes: (1) to protect against external threats of invasion; and (2) to guard against the internal threat our republic could degenerate to tyranny." [See Pet. App. at 16; Nordyke v. King, 319 F.3d at 1196 (9th Cir. 2003)]

Judge Gould described in practical terms how the individual rights doctrine could fulfill those purposes. He also noted that Silveira v. Lockyer 312 F.3d 1052 (9th Cir. 2002), reh'g en banc denied, 328 F.3d 567 (9th Cir. 2003), cert. denied, 124 S. Ct. 803 (2003) failed to adequately describe how the state's rights theory could accomplish even the limited constitutional objectives, set forth in the Silveria opinion, of providing a check and/or balance to a standing federal army.

> The Silveira majority takes the position that the Framers' concerns to check the possibility of a Federal government tyranny are sufficiently answered by reading the Second Amendment merely to ensure that the states could not be barred from funding state-organized militia. Silveira, 312 F.3d at 1085. I disagree. The Second Amendment cannot properly be interpreted to entrust the freedom of the people to the premise that state governments would arm a self-reliant people and protect the people against a federal tyranny. The practical concept of militia contemplates an armed citizenry capable of rising up, with what arms they hold or can

> find, to defeat, resist or at minimum delay an invader until more organized power can be marshalled. The likelihood of broad resistance from an armed citizenry is a deterrent to any would be invader. Equally important, the practical concept of militia, embracing an armed citizenry, stands to deter risk of government degradation to tyranny. This concept is weakened by *Silveira's* premise that the citizens could rely on their states to be an arsenal and repository for arms, and otherwise have no right.
>
> Judge Gould's Concurring Opinion *Nordyke v. King*, 319 F.3d at 1198 Pet. App. at 20

The relationship between the federal government, and the states regarding military issues has previously been found to be of manifest importance. See: *Perpich v. Department of Defense*, 496 U.S. 334, 339 (1990). This case raises similar issues regarding the relationships among the federal government, the states and individuals.

Judge KLEINFELD's observation that "10% of the Bill of Rights [has been] erased for 20% of the American people,"is all the more compelling for individuals living in California. Unlike 45 other states, the California State Constitution contains no guarantee of a "right to keep and bear arms." Nor does the California Supreme Court appear to recognize that right as part of any liberty interest in this state. See *Kasler v. Lockyer* 23 Cal. 4th 472, 97 Cal. Rptr. 2d 334 (2000)

> This fundamental right plaintiffs locate in article I, section 1 of the California Constitution, which provides: "All people are by nature free and independent and have inalienable rights. Among these are enjoying

> and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy." If plaintiffs are implying that a right to bear arms is one of the rights recognized in the California Constitution's declaration of rights, they are simply wrong. No mention is made in it of a right to bear arms. (See *In re Rameriz* (1924) 193 Cal. 633, 651 [226 P. 914, 34 A.L.R. 51] ["The constitution of this state contains no provision on the subject"].

Without the Second Amendment's protections, via the Fourteenth Amendment's due process clause, the people of California are without any legal recourse to address government abuses of the "right to keep and bear arms."

CONSTITUTIONALLY SIGNIFICANT CONFLICTS

The Elected Branches of the Federal Government vs. The Ninth Circuit

By some estimates there are over 200 million guns in over one-half the households in the United States.[2] Presidential candidates of both major political parties feel compelled to reassure voters that they believe in the people's "right to keep and bear arms," even as they disagree on the scope of that right.

Irrespective of statistics and rhetoric, the legislative and executive branches of the federal government have addressed the issue of the Second Amendment. An unelected federal judiciary should not be permitted to nullify the elected branches of the federal government without some comment from the Supreme Court.

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[2] Gary Kleck, Targeting Guns: Firearms and Their Control (N.Y. Aldine De Gruyther (1997))

In 1982, The United States Senate Committee on the Judiciary, Subcommittee on the Constitution issued a report titled The Right to Keep and Bear Arms. For the Subcommittee's conclusion [See Pet. App. at 97]:

> The conclusion is thus inescapable that the history, concept, and wording of the second amendment to the Constitution of the United States, as well as its interpretation by every major commentator and court in the first half century after its ratification, indicates that what is protected is an individual right of a private citizen to own and carry firearms in a peaceful manner.

Congress has declared in national legislation that the Second Amendment is a right of citizenship[3]:

> (a) Short Title – This Act may be cited as the "Firearm Owners' Protection Act".
>
> (b) Congressional Findings. – The Congress finds that –
>
> (1) the rights of citizens –
>
> (A) to keep and bear arms under the second amendment to the United States Constitution;
>
> (B) to security against illegal and unreasonable searches and seizures under the fourth amendment;

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[3] See: Firearm Owners' Protection Act of 1986, Pub. L. No. 99-308, 100 Stat. 449 (May 19, 1986).

> (C) against uncompensated taking of property, double jeopardy, and assurance of due process of law under the fifth amendment; and
>
> (D) against unconstitutional exercise of authority under the ninth and tenth amendments;
>
> require additional legislation to correct existing firearms statutes and enforcement policies; and
>
> (2) additional legislation is required to reaffirm the intent of the Congress, as expressed in section 101 of the Gun Control Act of 1968, that "it is not the purpose of this title to place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms appropriate to the purpose of hunting, trap-shooting, target shooting, personal protection, or any other lawful activity, and that this title is not intended to discourage or eliminate the private ownership or use of firearms by law-abiding citizens for lawful purposes."

Congress grouped the "right to keep and bear arms" along side other fundamental rights similar to this Court's categorizations. See generally: *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990).

Excepting the lonely Second Amendment, this is also a list of some fundamental rights that have been applied against state

action through the 14th Amendment's Dues Process Clause.[4] See : *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) where the judgment of this Court quoted the second Justice Harlan's famous dissent in *Poe v. Ullman*, 367 U.S. 497, 543 (1961):

> [T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This "liberty" is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, [...] and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.

The executive branch is in accord. In his Brief in Opposition to a Petition for Writ of Certiorari in *United States v. Emerson*, 122 S. Ct. 2362; 153 L. Ed. 2d 184, at page 19 n.3, Theodore B. Olson, Solicitor General for The United States wrote:

> n.3 In its brief to the court of appeals, the government argued that the Second Amendment protects only such acts of

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[4] See: *Engblom v. Carey*; 677 F.2d 957 (2nd Cir. 1982) for a modern decision finding the Third Amendment to be an individual right incorporated against state action through the 14th Amendment Due Process Clause.

> firearm possession as are reasonably related to the preservation or efficiency of the militia. See Gov't C.A. Br. 11-29. The current position of the United States, however, is that the Second Amendment more broadly protects the rights of individuals, including persons who are not members of any militia or engaged in active military service or training, to possess and bear their own firearms, subject to reasonable restrictions designed to prevent possession by unfit persons or to restrict the possession to types of firearms that are particularly suited to criminal misuse. See Memorandum From the Attorney General to All United States Attorneys, Re: *United State[illegible] Emerson*, Nov. 9, 2001. A copy of that memorandum is appended to this brief.

That memorandum by the Attorney General of the United States declares in relevant part:

> *Emerson* is also noteworthy because, in upholding this statute, the Fifth Circuit undertook a scholarly and comprehensive review of the pertinent legal materials and specifically affirmed that the Second Amendment "protects the right of *individuals*, including those not then actually a member of any militia or engaged in active military service or training, to privately possess and bear their own firearms...." The Court's opinion also makes the important point that the existence of this individual right does not mean the reasonable restrictions cannot be imposed to prevent unfit persons from possessing firearms or to restrict possession

> of firearms particularly suited to criminal misuse. In my view, the *Emerson* opinion, and the balance it strikes, generally reflect the correct understanding of the Second Amendment.

The Ninth Circuit's interpretation of the Second Amendment conflicts with that of the elected branches of government. The Supreme Court should resolve this conflict.

United States Supreme Court v. The Ninth Circuit

On the issue of 14th Amendment Due Process incorporation, even the *Silveira* panel concluded, notwithstanding the standing issues, that the refusal to incorporate various provisions of the Bill of Rights though the 14th Amendment Due Process Clause, based upon the holdings of *United States v. Cruikshank*, 92 U.S. 542 (1876) and *Presser v. Illinois*, 116 U.S. 252 (1886) rests upon a now discredited view. [See: *Silveira v. Lockyer* 312 F.3d 1052, 1067 fn.17.]

Many of this Court's references to the Second Amendment are brief, but they all portray it as an individual right, usually lumping it together with the rest of the Bill of Rights. Interpreting the phrase "right of the people" in the Fourth Amendment this Court suggested that as used there and in the First and Second Amendments, it denotes rights of individuals. See: *U.S. v. Verdugo-Urquidez*, 494 U.S. 259, 266 (1990).

The idea of the Second Amendment guaranteeing state power over the militia flies in the face of an unbroken line of federal case law dating back to 1820. Those cases hold that the states have no power over the militia vis-a-vis federal control.[5]

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[5] Inter alia, *Houston v. Moore*, 18 U.S. 1, 24 (1820) (federal militia legislation preempts state), *Martin v. Mott*, 25 U.S. 19 (1827) (president's power to call militia from state control into federal service),

The only Supreme Court case to directly consider the Second Amendment at any length was *United States v. Miller*, 307 U.S. 174 (1939).[6] The case held that an indictment should not have been dismissed on the blanket theory that the National Firearms Act violated the Second Amendment. Neither of the defendants were, or claimed to be, members of the militia. Nor did the Court suggest they needed to allege such a status to challenge the statute under the Amendment. Instead, the *Miller* Court held that the validity of a law regulating sawed-off shotguns depends on whether they are the kind of firearms the Second Amendment protects individuals in possessing.

Dealing with the challenge on its merits, this Court held the Amendment guarantees possession of military-type weapons only. Having fixed on this military-weapon standard, the Court reversed the dismissal of the indictment because there had been no trial to establish whether a sawed off shotgun is a military weapon. See *Miller*, Id. at 178 - 179.

Miller, Id., reached this basically individual right result even though the individual right view was not argued to the Court. The matter went up from the trial court on the government's appeal and neither defendant appeared above. The only brief filed was the government's. Even more significant, the states' right-collective right view was actually presented to the Court

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Selective Draft Law Cases, 245 U.S. 366, 383 (1918) (Congress has authority to abolish states militia by bodily incorporating them into federal army), *Perpich v. Department of Defense*, 496 U.S. 334 (1990) (state militias may be called into federal service over state objection because federal authority over the militia is paramount).

[6] *Miller*, Id. is by no means the only Supreme Court case that has commented on the Second Amendment. See David Kopel, Stephen Halbrook, Ph.D., and Alan Korwin, SUPREME COURT GUN CASES: Two Centuries of Gun Rights Revealed (Bloomfield Press (2004)). This book collects more than 40 cases where the Supreme Court has discussed the Second Amendment in some capacity or other.

in the brief for the United States[7] – yet the Court did not even address that argument, rather the Court cited 19th Century cases construing the right to arms provisions as an individual right.

Sister Circuits vs. the Ninth Circuit

The states' rights theory first appeared in a First Circuit case which only "followed" *Miller* chronologically but expressly refused to follow it doctrinally, asserting that *Miller* had not meant to establish a standard for future cases. *Cases v. U.S.*, 131 F.2d 916, 922 (1st Cir.1942).

Cases, Id., set the pattern for future circuit court cases, that adopted the states' right theory without any discussion of the historical, textual or legal points we raise herein. What followed was a series of terse circuit court cases that purport to follow a *Miller* "standard" without recognizing that they are instead following *Cases* which expressly departed from *Miller*.[8] Some of these cases arrive at the unquestionably correct conclusion that felons have no rights under the Second Amendment.

Apparently the first[9] Ninth Circuit case to consider the issue

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[7] It "argued that the [Second Amendment] right was a collective one that [only] protected the people when carrying arms as members of the state militia." Vol. 1, R. Cottrol, GUN CONTROL AND THE CONSTITUTION, xxvii (Introduction) (NY Garland, 1993).

[8] See *eg.*, *U.S. v. Toner*, 728 F. 2d 115, 129 (2nd Cir. 1984), *Marchese v. California*, 545 F. 2d 645, 646 (9th Cir. 1976), *United States v. Warin*, 530 F.2d 103, 106 (6th Cir. 1976), *U.S. v. Johnson*, 497 F. 2d 548, 550 (4th Cir. 1974)

[9] It should be noted that *Robertson v. Baldwin*, 165 U.S. 275 (1897) arose out of an appeal from the Northern District of California. This is significant because *Robertson* is a U.S. Supreme Court case that implicitly recognized the "right to keep and bears arms" as an individual

was *Marchese v. California*, 545 F.2d 645, 646 (9th Cir. 1976) which rejected the individual right view in a single sentence citing some of the other terse circuit court cases. The next case was *Fresno Rifle & Pistol Ass'n. v. VanDeKamp*, 965 F.2d 723 (9th Cir. 1992). The panel in that case acknowledged the individual vs. states' right debate as an open question, but refused to decide the issue. Instead the *Fresno* panel, disposed of the case based on 19th Century Supreme Court case law holding that the Second Amendment restrains only the federal government, not the states. See: *Fresno*, at 729 *et seq.*

Then *Hickman v. Block*, 81 F.3d 98, 102 (9th Cir. 1996) concluded that individuals do not even have standing to raise a Second Amendment claim because that Amendment "guarantees [only] the right of the states to maintain [an] armed militia...." It is ironic that *Hickman* sees this conclusion as deriving from *Miller*, *supra*, and following cases, since it exactly reverses what *Miller* actually did as to standing. Recall that the *Miller* Court entertained a Second Amendment challenge by two men who made no claim to membership in the militia.

Then *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001) held that the Amendment protects an individual right, devoting more reasoning and analysis to the matter than all the prior circuit court opinions combined.

After the 5th Circuit's *Emerson*, decision, another panel of the Ninth Circuit Court sought to shore up the states' rights position in *Silveira v. Lockyer*, 312 F.3d 1052 (9th Cir. 2002).

Currently the Ninth Circuit refuses to consider Second Amendment issues on the basis that the Circuit's position is

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right and *Robertson* – not *Hickman* – is first in time. Therefore *Robertson* should arguably be Ninth Circuit precedent on Second Amendment issues. Intra-circuit conflicts can be addressed in a petition for certiorari. See, e.g. *John Hancock Ins. Co. v. Bartels*, 308 U.S. 180, 181 (1939).

fixed by *Hickman*.[10] Petitioners submit that *certiorari* is required to either: a) repudiate the states' right view, or b) establish an intellectually valid basis for it by addressing the following problems which *Hickman* and *Silveira* fail to address:

- The mechanics of the standing issue, unstated in *Hickman*, and vaguely expressed in *Silveira*, necessarily implies that any litigation brought to remedy a breach of the "right to keep and bear arms" can only be addressed through a suit brought by the states on behalf of "the people." The states must assume the role of *parens patriae* on behalf their citizens. This is contrary to doctrines articulated by this Court. "The first eight Amendments to the Constitution set forth self-executing prohibitions on governmental action, and this Court has had primary authority to interpret those Prohibitions." See: *City of Boerne v. Flores*; 521 U.S. 507, 524 (1997)

- Construing the "self-executing" provisions of the 15th Amendment in *So. Carolina v. Katzenbach*; 383 U.S. 301, 324 (1966), this Court wrote: "Nor does a State have standing as the parent of its citizens to invoke these constitutional provisions against the Federal Government, the ultimate *parens patriae* of every American citizen. *Massachusetts v. Mellon*, 262 U.S. 447, 485-486; *Florida v. Mellon*, 273 U.S. 12, 18."

- Neither *Silveira*, nor any other decision advancing the states' right theory mentions – much less reconciles – this Court's holdings that states have no power over the militia as against federal control. (See fn.5 supra.)

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[10] See: *US v. Hinostroza*, 297 F.3d 924, 927 (9th Cir. 2002); *US v. Hancock*, 231 F.3d 557 (9th Cir. 2000); *US v. Mack*, 164 F.3d 467 (9th Cir. 1999); *San Diego Co. Gun Rights Comm. v. Reno*, 98 F.3d 1121 (9th Cir. 1996); and *US v. Gomez*, 92 F.3d 770 (9th Cir. 1996) [*contra*: fn. 7]

- Neither *Hickman* nor *Silveira* offers any reconciliation of the Amendment's use of the term of art "right of the people" used in several other parts of the Bill of Rights. Are we to believe that the First Congress used "right of the people" to mean a right of individuals in the First Amendment, but 16 words later in the Second it means a right of the states, but 26 words later in the Fourth it means a right of individuals?

- Neither *Hickman* nor *Silveira* offers any answers to *Emerson's* point that, "As used throughout the Constitution, the people have 'powers' or 'rights,' but federal and state governments have 'powers' or 'authority, never 'rights.'" *U.S. v. Emerson*, 270 F.3d at 227. Then there are the Ninth and Tenth Amendments which specifically refer to people's rights and powers and the states' mere powers. See also: *Katzenbach*, *supra* at p. 323: "The word "person" in the context of the Due Process Clause of the Fifth Amendment cannot, by any reasonable mode of interpretation, be expanded to encompass the States of the Union, and to our knowledge this has never been done by any court."

CONCLUSION: SECOND AMENDMENT ISSUES

As Judge Gould stated in his concurring opinion in *Nordyke v. King*, 319 F.3d at 1197 [Pet. App. at 19 *et seq*]:

> We would make progress if the Supreme Court were to establish a doctrine of an individual Second Amendment right subject to reasonable government regulation. The decisional chips would thereafter fall where they may on the basis of particular cases and the delicate balance of their precise facts, aided by the complementary efforts of

> lawyers, scholars and judges. The law would best put aside extreme positions and adopt an assessment of reasonableness of gun regulation, for this would place us on the right track.
>
> Gould Concurring [footnotes omitted]

For these reasons, Petitioners respectfully request that their petition for a writ of certiorari be granted on the Second Amendment questions set forth above.

REASONS FOR GRANTING CERTIORARI ON THE FIRST AMENDMENT ISSUES

It is respectfully suggested that the First Amendment issue in this case may appropriately be resolved by summary reversal.

Such core First Amendment activity as takes place at gun shows is not peripheral to the challenged ordinance but central to its focus. At a press conference announcing its enactment Defendant KING expressed her opposition to "the gun culture," explaining the ordinance as seeking to ban gun shows because they promote positive views of guns and express and promote the gun culture. The county's defense has emphasized, the ordinance does not prevent the sale of firearms at a gun show. What it prevents is the possession and display of firearms.

Preliminary injunctive relief was supported by 300+ declarations from customers that attended, or had exhibits at NORDYKE'S gun shows [See Appellants' Excerpt of Record (hereafter ER), Tabs 2 & 5]:

> To obtain the latest information regarding the safe, responsible and lawful ownership and storage of firearms...; regarding the firearms industry, with specific reference to developments in technology and safety; ..

> [and] to obtain information and engage in the trade of historical and military memorabilia...

The NORDYKES also filed declarations that the ordinance would make it near impossible for them to conduct future gun shows. [See ER, Tabs 3, 4] For how can a gun show be conducted without guns?

In a memorandum, Defendant KING had directed county counsel to research a way to ban gun shows and to draft an ordinance for that purpose. [See ER, Tab 1, Exhibit D attached to Original Verified Complaint.]

Her press conference after that ordinance was passed described it as a ban on gun shows on county property. That same press release contained abstract references to the evils associated with guns and their sale. But her explanation of why gun shows should be suppressed consisted in asserting: that such suppression is opposed by "gun worshipers;" that gun shows express and promote the gun culture and positive feelings about guns; that it was abhorrent for the county to provide a public forum for "the promotion of guns;" and that the ordinance "is an effort to acknowledge, highlight and remove the county from any real *or perceived* participation in that scourge [gun violence]." She denounced the public forum concept insofar as it meant that "... a facility owned by the residents of this county, who are suffering so clearly from the criminal use of guns is expected to provide a place for people to display guns for worship as deities for the collectors who treat them as icons of patriotism." [See ER, Tab 1, Exhibit E attached to Original Verified Complaint.]

In the earlier memorandum Supervisor KING urged: "Even if the courts strike us down, I think we have a moral obligation to pursue *our philosophy* in this instance."

State law does allow gun sales at gun shows, but it prevents the gun being delivered until long after the gun show ends. Whether at gun shows or gun stores the gun cannot be delivered

until there has been a background check and ten day waiting period. [See: Cal Pen C. 12071(B)(1)(B) and (b)(3)(A).]

The Ordinance is prefaced by findings about the abstract evils flowing from guns. [See Pet. App. at 94] The only relevance of those findings to gun shows would have to follow Supervisor KING's reasoning quoted above: That the "worship" of guns leads to murder and other evils, gun shows embody, express and promote the gun culture and the worship of guns – so gun shows should be banned.

Insofar as laws can control misconduct with guns, the County's ordinance has nothing to do with such misconduct. What it does is close off the public forum of the Fairgrounds to the display of antique (as well as modern) firearms as art objects or in lectures on firearms history or technology or in historical reenactments or of firearms safety classes or, indeed, even in color guard presentations, all of these being things that had routinely occurred at Nordyke gun shows.

The County has rendered its Fairgrounds "a public forum by designation" (*Board of Airport Commissioners v. Jews for Jesus*, 482 U.S. 569, 573 (1987)). Thus as to gun shows it is bound by "the same standards as apply in a traditional public forum." *Perry Education Ass'n. v. Perry Local Educators' Ass'n.*, 460 U.S. 37, 46 (1983). In such a situation "First Amendment protections are subject to heightened scrutiny." *Board of Airport Commissioners, supra*. Even if the ordinance were not intended to suppress ideas or prefer one viewpoint and suppress another, insofar as it affect First Amendment interests, it "must be narrowly drawn to effectuate a compelling state interest." *Perry, supra, Meyer v. Grant*, 486 U.S. 414, 427 (1988), and must not regulate beyond the extent absolutely "necessary" to serve that interest. *Meyer, id.*, 486 U.S. at 426, 427 (striking down law on the basis that, while relevant to a compelling state interest, it was not "necessary", in that other legislation existed, or could be enacted, to adequately serve that interest).

The Ordinance bars the display of antique, relic and curio firearms on county property. Federal and state law carefully differentiate antiques from modern weaponry. Thus the Ordinance would not just bar the American Legion putting on an historical exhibition at the Fairgrounds of firearms used in pre-20th Century wars, it would also bar the Arms and Armor Section of the Metropolitan Museum of Art from putting on an exhibition of its 14th, 15th and 16th Century firearms.

The display of guns as art objects, or in the course of lectures on firearms history or technology should be protected because the "Constitution looks beyond written or spoken words [and embraces all] mediums of expression", including cultural symbols or artistic media. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*, 515 U.S. 557, 569 (1995).

That firearms, particularly antiques, may be important symbols should come as no surprise. The militiaman with his musket has been a potent symbol for as long as the U.S. has been a nation. The display and sale of symbolic objects enjoys some First Amendment protection even though some people may not see the object as having symbolic significance and it conveys no "'particularized message'", no "narrow, succinctly articulable" meaning, e.g,. the "painting[s] of Jackson Pollock, [the] music of Arnold Schoenberg or [the] Jabberwocky verse of Lewis Carroll." *Hurley*, *supra*, 515 U.S. at 569.

This point was illustrated in a back-handed way in the District Court's Order denying Petitioner's request for injunctive relief where that court conceded that guns are symbols [See Pet. App. at 53]:

> Such situations are imaginable in our case. Suppose anti-gun advocates were to stage a protest at the Fairgrounds in which they collected guns and dismantled them to express the idea that guns should be eliminated from society. The dismantling of

> the guns itself would be an expressive act supporting their ideas. They might even choose to burn guns to express their views as Johnson burned his flag. These seem like plausible ways in which possession of a gun could amount to expressive conduct.

There can be no question that the display of firearms as symbolic objects, art objects or for the purpose of educating the public in firearms history, American history, world history or the history of technology, enjoys First Amendment protection. See: *Edwards v. City of Goldsboro*, 178 F.3d 231, 247 (4th Cir. 1999) (firearm safety expositions that included "physical demonstrations" held to enjoy First Amendment protection).

In general, objects of such significance not only "have First Amendment protection" (*Kaplan v. California*, 413 U.S. 115, 119-120 (1973) but, in their educational aspect, have "transcendent value" and are "a 'special concern of the First Amendment.'" *University of Pennsylvania v. E.E.O.C.*, 493 U.S. 182, 195-96 (1990) and cases there cited describing academic freedom. It is also noteworthy that attendees at the show have a First Amendment right to receive such presentations entirely independent of the right to put them on.[11]

The literal terms of the ordinance, prohibit gun possession on any county property, not just at gun shows. But the legislative history speaks for itself in showing that the ordinance's focus is on gun shows at the Fairgrounds. In any event, the issue in this case is a request for preliminary relief against enforcement of the ordinance as to gun shows at the Fairgrounds.

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[11] See Generally: *Virginia State Bd. of Pharmacy v. Virginia Citizen's Consumer Council* (1976) 425 U.S. 748, 756, *Kleindienst v. Mandel* (1972) 408 U.S. 753, 764-65, *Lamont v. Postmaster General* (1965) 381 U.S. 301.

Note also the ordinance's special exception allowing guns to be displayed on county property in theatrical productions. Why theatrical productions but not gun shows? The obvious reason is content. Theatrical productions, which often portray guns as evil and involved in evil acts, conform to County "philosophy" as expressed in the ordinance. That is the opposite of the despised "philosophy" of gun shows and the way firearms are portrayed in gun shows. As Supervisor KING put it, gun shows should be suppressed because they are "a place for people to display guns for worship as deities for the collectors who treat them as icons of patriotism."

Study of both the author's statements and the ordinance itself reveals much discussion of evils associated with guns. But only one theory is offered connecting gun shows to these evils – that gun shows embody, express and promote the gun culture and thereby encourage people to think guns may be good things rather than evil things. Thus the relief sought is on all fours with this Court's decision in *Kingsley International Pictures Corp. v. Regents*, 360 U.S. 684 (1959). New York there sought to ban the movie "Lady Chatterley's Lover" on the ground that it promoted the idea that adultery could sometimes be justifiable. This Court responded that the First Amendment leaves states free to directly combat evils but denies them any power to suppress expression of opinions and ideas on the ground that they may lead to evils.

Petitioners respectfully request that the petition for certiorari be granted, and the case summarily reversed on the First Amendment grounds set forth above.

Respectfully submitted,

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APPENDIX

OPINION AND ORDER OF UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT AFFIRMING DISTRICT COURT'S ORDER DENYING PLAINTIFFS' MOTION FOR INJUNCTIVE RELIEF

Filed: February 18, 2003

JUDGES:
Before: Arthur L. Alarcon, Diarmuid F. O'Scannlain and Ronald M. Gould, Circuit Judges. Opinion by Judge O'Scannlain; Concurrence by Judge Gould.

OPINION BY:
Diarmuid F. O'Scannlain

OPINION:

O'SCANNLAIN, Circuit Judge:

We must decide whether a local ordinance prohibiting the possession of firearms on county property infringes upon constitutional rights protected by the First and Second Amendments.

I

Russell Nordyke and Sallie Nordyke (dba TS Trade Shows) ("Nordyke") have been promoting gun shows at the Alameda County Fairgrounds ("Fairgrounds") since 1991. The Fairgrounds are located on unincorporated county land in the City of Pleasanton. The exhibitors at the show include sellers of antique (pre-1898) firearms, modern firearms, ammunition, Old West memorabilia, and outdoor clothing. In addition, the show hosts educational workshops, issue groups, and political organizations.

In August 1999, Alameda County ("County") passed an ordinance making illegal the possession of firearms on County

property ("Ordinance"). In pertinent part, the Ordinance reads: "Every person who brings onto or possesses on county property a firearm, loaded or unloaded, or ammunition for a firearm is guilty of a misdemeanor." Alameda County, Cal., Ordinance § 9.12.120(b). The Ordinance would forbid the presence of firearms at gun shows, such as Nordyke's, held at the Fairgrounds. As a practical matter, the Ordinance makes it unlikely that a gun show could profitably be held there.

Seeking to prevent the Ordinance's enforcement, Nordyke brought suit against the County in the United States District Court for the Northern District of California. Nordyke applied for a temporary restraining order, claiming that the Ordinance was preempted by state gun regulations and that it violated the First Amendment's free speech guarantee. The district court judge treated the application as one for a preliminary injunction and denied it. The judge noted that under either test for a preliminary injunction, a litigant must at least show a fair chance of success on the merits and ruled that Nordyke had failed to do so. Because he concluded that Nordyke had little chance of success on the merits, he did not reach the balance of the hardships determination. Nordyke then filed this timely interlocutory appeal.

We certified Nordyke's preemption claim to the California Supreme Court asking the following question: "Does state law regulating the possession of firearms and gun shows preempt a municipal ordinance prohibiting gun possession on county property"? *Nordyke v. King ("Nordyke I"), 229 F.3d 1266, 1267 (9th Cir. 2000).*

The California Supreme Court granted certification and ultimately held, "whether or not the Ordinance is partially preempted, Alameda County has the authority to prohibit the operation of gun shows held on its property, and, at least to that extent, may ban possession of guns on its property." *Nordyke v. King ("Nordyke II"), 27 Cal. 4th 875, 44 P.3d 133, 138, 118 Cal. Rptr. 2d 761 (Cal. 2002).* Pursuant to Rule 29.5 of the

California Rules of Court we follow the answer provided by the California Supreme Court to the certified question. We therefore conclude that the district court properly determined that Nordyke's preemption claim was without merit.

Nevertheless, we must still decide Nordyke's remaining constitutional claims. Nordyke urges, under the First Amendment, that the Ordinance impermissibly infringes upon constitutionally protected speech rights.

Nordyke also makes a Second Amendment challenge to the Ordinance. Pending the certification of Nordyke's preemption claim to the California Supreme Court, there were several judicial developments relating to the Second Amendment. As a result, Nordyke filed a motion for supplemental briefing with this court which we granted. Because of our sister circuit's holding in *United States v. Emerson, 270 F.3d 203 (5th Cir. 2001),* and the change in the United States government's position on the scope of the Second Amendment,[1] n1 Nordyke now urges on appeal that the Ordinance unduly infringes the right of individuals under the Second Amendment to possess privately and to bear their own firearms.

II

We consider first Nordyke's challenge to the Ordinance on the grounds that it infringes his First Amendment right to free speech. The district court squarely rejected Nordyke's argument that gun possession is expressive conduct protected by the First Amendment and that the ban on the possession of firearms unconstitutionally interferes with commercial speech.[2]

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[1] *See* Opposition to Petition for Certiorari in *United States v. Emerson,122 S. Ct. 2362; 153 L. Ed. 2d 184, at 19 n.3, available at* http://www.usdoj.gov/osg/briefs/2001/0responses/2001-8780.resp.pdf.

[2] In addition, the district court considered whether the Ordinance was a constitutional time, place, and manner regulation.

A

As to Nordyke's expressive conduct claim, the Supreme Court has "rejected the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *Texas v. Johnson, 491 U.S. 397, 404, 105 L. Ed. 2d 342, 109 S. Ct. 2533 (1989)* (citation and internal quotation marks omitted). However, the Court has "acknowledged that conduct may be sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments." *Id.* (citation and internal quotation marks omitted).

In the case at hand, Nordyke argues that possession of guns is, or more accurately, can be speech. In evaluating his claim, we must ask whether "[a]n intent to convey a particularized message [is] present, and [whether] the likelihood [is] great that the message would be understood by those who viewed it." *Spence v. Washington, 418 U.S. 405, 410-11, 41 L. Ed. 2d 842, 94 S. Ct. 2727 (1974).* If the possession of firearms is expressive conduct, the question becomes whether the County's "regulation is related to the suppression of free expression." *Johnson, 491 U.S. at 403.* If so, strict scrutiny applies. If not, we must apply the less stringent standard announced in *United States v. O'Brien, 391 U.S. 367, 377, 20 L. Ed. 2d 672, 88 S. Ct. 1673 (1968).*

The first step of this inquiry--whether the action is protected expressive conduct--is best suited to an as applied challenge to the Ordinance. However, in this case, Nordyke challenged the law before it went into effect. Accordingly, he mounts a facial challenge, relying on hypotheticals and examples to illustrate his contention that gun possession can be speech.

In evaluating Nordyke's claim, we conclude that a gun itself is not speech. The question in *Johnson* was whether flag

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Nordyke does not press this argument on appeal, however.

burning was speech, not whether a flag was speech. *491 U.S. at 404-06.* Here too, the correct question is whether gun possession is speech, not whether a gun is speech. Someone has to do something with the symbol before it can be speech. Until the symbol is brought onto County property, the Ordinance is not implicated. *See also* *Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 21 L. Ed. 2d 731, 89 S. Ct. 733 (1969)* (analyzing whether the wearing of armbands is speech, not whether armbands themselves are speech); *O'Brien, 391 U.S. at 376* (analyzing whether burning of draft cards is speech).

In the context of a facial challenge, Nordyke's contentions are unpersuasive. Gun possession can be speech where there is "an intent to convey a particularized message, and the likelihood [is] great that the message would be understood by those who viewed it." *Spence, 418 U.S. at 410-11.* As the district court noted, a gun protestor burning a gun may be engaged in expressive conduct. So might a gun supporter waving a gun at an anti-gun control rally. Flag waving and flag burning are both protected expressive conduct. *See Johnson, 491 U.S. at 404-06.* Typically a person possessing a gun has no intent to convey a particular message, nor is any particular message likely to be understood by those who view it. The law itself applies broadly to ban the possession of all guns for whatever reason on County property. The law includes exceptions, primarily for those otherwise allowed to carry guns under state law, but these exceptions do not narrow the law so that it "has the inevitable effect of singling out those engaged in expressive activity." *Arcara v. Cloud Books, Inc., 478 U.S. 697, 706-07, 92 L. Ed. 2d 568, 106 S. Ct. 3172 (1986).*

As Nordyke's "facial freedom of speech attack" does not involve a statute "directed narrowly and specifically at expression or conduct commonly associated with expression," his challenge fails. *See Roulette v. City of Seattle, 97 F.3d 300, 305 (9th Cir. 1996)* (quoting *City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 760, 100 L. Ed. 2d 771, 108 S. Ct. 2138 (1988)).* In *Roulette*, we turned back a facial First

Amendment challenge to a city ordinance prohibiting sitting or lying on the sidewalk. The plaintiffs argued that the law infringed their free speech rights because sitting and lying can sometimes communicate a message. *See 97 F.3d at 303.* We "reject[ed] plaintiffs' facial attack on the ordinance" because this conduct is not "integral to, or commonly associated with, expression." *97 F.3d at 305.* Likewise, Nordyke's challenge fails because possession of a gun is not "commonly associated with expression."

Nordyke points out that several of the rifles for sale are decorated with political messages, most prominently the National Rifle Association Tribute Rifle, which depicts the NRA banner, a militia member and an inscription quoting the Second Amendment: "The Right of the People to Keep and Bear Arms." Where the symbols on the gun (not the gun itself) convey a political message, the gun likely represents a form of political speech itself. *See* *Gaudiya Vaishnava Soc'y v. City and County of San Francisco, 952 F.2d 1059, 1063 (9th Cir. 1991)* (holding that merchandise displaying political messages are entitled to First Amendment protection). Here, Nordyke is mounting a facial challenge. In this context, the presence of a handful of NRA Tribute Rifles at a show at which the vast majority of the prohibited guns bear no message whatsoever does not impugn the facial constitutionality of the Ordinance. *See* *Roulette, 97 F.3d at 305; cf.* *Gaudiya, 952 F.2d at 1064-65* (upholding First Amendment challenge where case involved only merchandise bearing political messages). Thus, we agree with the district court's conclusion that the Ordinance does not unconstitutionally infringe expressive conduct.[3]

B

Next, Nordyke contends that the Ordinance's prohibition of

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[3] However, we note that our holding does not foreclose a future as applied challenge to the Ordinance.

gun possession on County property unconstitutionally burdens his right to commercial speech. We have previously held that the act of exchanging money for a gun is not "speech" for the purposes of the First Amendment. *See* Nordyke v. Santa Clara County *("Nordyke III"), 110 F.3d 707, 710 (9th Cir. 1997).* In Nordyke III, the very same Nordykes that are before us in this case successfully challenged an addendum to a lease between the county and the fairgrounds operator that barred gun shows from the fairgrounds. The lease addendum held to be an unconstitutional infringement of commercial free speech rights in Nordyke III prohibited offers to sell guns. In contrast, the Ordinance here bars neither sales nor offers to sell, only possession. *See* Alameda County, Cal., Ordinance § 9.12.120(b). Nevertheless, Nordyke argues that the prohibition on possession makes the sale more difficult and sometimes impossible, stifling commercial speech.

Pursuant to Nordyke III, the sale itself is not commercial speech. It is difficult to argue then that making the sale (non speech) more difficult by barring possession (non-speech) infringes speech. Nordyke cites no authority for this proposition. Nor is this the case of making a sale more difficult by barring speech. In cases such as Nordyke III, what renders the law unconstitutional is the interference with speech itself, not the hindering of actions (e.g., sales) that are not speech. As possession itself is not commercial speech and a ban on possession at most interferes with sales that are not commercial speech, we agree with the district court's conclusion that the County's prohibition on possession does not infringe Nordyke's right to free commercial speech.

III

Finally, we turn to Nordyke's challenge to the Ordinance on Second Amendment grounds. The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed." U.S. Const. amend. II. The

meaning of this amendment and the extent of the constitutional right it confers have been the subject of much scholarly and legal debate.

The "individual rights" view advocated by Nordyke has enjoyed recent widespread academic endorsement. *See, e.g.*, Sanford Levinson, *The Embarrassing Second Amendment*, *99 Yale L.J. 637 (1989);* Eugene Volokh, *The Commonplace Second Amendment*, *73 N.Y.U. L. Rev. 793 (1998).* In addition, Nordyke finds support for the individual rights interpretation from our sister circuit's recent holding in *United States v. Emerson*, *270 F.3d 203 (5th Cir. 2001),* that the Second Amendment "protects the right of individuals, including those not then actually a member of any militia or engaged in active military service or training, to privately possess and bear their own firearms." *Id. at 260.*

We recognize that our sister circuit engaged in a very thoughtful and extensive review of both the text and historical record surrounding the enactment of the Second Amendment. And if we were writing on a blank slate, we may be inclined to follow the approach of the Fifth Circuit in *Emerson*. However, we have squarely held that the Second Amendment guarantees a *collective* right for the states to maintain an armed militia and offers no protection for the individual's right to bear arms. In *Hickman v. Block*, *81 F.3d 98, 102 (9th Cir. 1996),* we held that "it is clear that the Second Amendment guarantees a collective rather than an individual right. Because the Second Amendment guarantees the right of the states to maintain armed militia, the states alone stand in the position to show legal injury when this right is infringed." (citations and internal quotation marks omitted).

As a result, our holding in *Hickman* forecloses Nordyke's Second Amendment argument. We specifically held there that individuals lack standing to raise a Second Amendment challenge to a law regulating firearms. *Id. at 103.* Because "Article III standing is a jurisdictional prerequisite," *id. at 101,*

we have no jurisdiction to hear Nordyke's Second Amendment challenge to the Ordinance. *See* *Ex parte McCardle*, *74 U.S. (7 Wall.) 506, 514, 19 L. Ed. 264 (1868)* ("Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is the power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.").[4]

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[4] We should note in passing that in Silveira v. Lockyer, 312 F.3d 1052 (9th Cir. 2002), another panel took it upon itself to review the constitutional protections afforded by the Second Amendment even though that panel was also bound by our court's holding in Hickman. The panel in Silveira concluded that analysis of the text and historical record led it to the conclusion that the collective view of the Second Amendment is correct and that individual plaintiffs lack standing to sue.

However, we feel that the Silveira panel's exposition of the conflicting interpretations of the Second Amendment was both unpersuasive and, even more importantly, unnecessary. We agree with the concurring opinion in Silveira: "[W]e are bound by the Hickman decision, and resolution of the Second Amendment issue before the court today is simple: plaintiffs lack standing to sue for Second Amendment violations because the Second Amendment guarantees a collective, not an individual, right." Silveira v. Lockyer, 312 F.3d 1094 (9th Cir. 2002) (Magill, J., concurring). This represents the essential holding of Hickman and is the binding law of this circuit.

There was simply no need for the Silveira panel's broad digression. In a recent case, an individual plaintiff cited to the Fifth Circuit's holding in Emerson and argued that the Second Amendment protects an individual right to bear arms. United States v. Hinostroza, 297 F.3d 924, 927 (9th Cir. 2002). However, we summarily, and properly as a matter of stare decisis, rejected the Second Amendment challenge on the grounds that it is foreclosed by this court's holding in Hickman.

Therefore, despite the burgeoning legal scholarship supporting the "individual rights" theory as well as the Fifth Circuit's holding in Emerson, the Silveira panel's decision to re-examine the scope and purpose of the Second Amendment was improper. Because "only the court sitting en banc may overrule a prior decision of the court," Morton v. De Oliveira, 984 F.2d 289, 292 (9th Cir. 1993), the Silveira panel was bound by Hickman, and its rather lengthy re-consideration of Hickman was neither warranted nor constitutes the binding law of this circuit.

IV

For the foregoing reasons, the district court's denial of Nordyke's application for a preliminary injunction must be

AFFIRMED.

CONCUR BY:
Ronald M. Gould

CONCUR:
GOULD, Circuit Judge, Specially Concurring:

I join the court's opinion, and write to elaborate that *Hickman v. Block, 81 F.3d 98 (9th Cir. 1996),* was wrongly decided, that the remarks in *Silveira v. Lockyer, 312 F.3d 1052 (9th Cir. 2002),* about the "collective rights" theory of the Second Amendment are not persuasive, and that we would be better advised to embrace an "individual rights" view of the Second Amendment, as was adopted by the Fifth Circuit in *United States v. Emerson, 270 F.3d 203, 260 (5th Cir. 2001),* consistent with *United States v. Miller, 307 U.S. 174, 83 L. Ed. 1206, 59 S. Ct. 816 (1939).*[1] We should recognize that individual citizens have a right to keep and bear arms, subject

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Accordingly, we ignore the Silveira panel's unnecessary historical disquisition as the dicta that it is and consider ourselves bound only by the framework set forth in Hickman.

[1]This view is the current view of the United States. See Opposition to Petition for Certiorari in United States v. Emerson, 122 S. Ct. 2362, 153 L. Ed. 2d 184, at 19 n.3, available at http://www.usdoj.gov/osg/briefs/2001/0responses/ 20018780.resp.pdf ("The current position of the United States . . . is that the Second Amendment more broadly protects the rights of individuals, including persons who are not members of any militia or engaged in active military service or training, to possess and bear their own firearms, subject to reasonable restrictions . . . .").

to reasonable restriction by the government.[2] We should also revisit whether the requirements of the Second Amendment are incorporated into the Due Process Clause[3] of the Fourteenth

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[2] *Emerson, 270 F.3d at 260. See also* Memorandum from the Attorney General [John Ashcroft] to all United States Attorneys, Re: *United States v. Emerson*, Nov. 9, 2001. ("The [*Emerson*] opinion also makes the important point that the existence of this individual right does not mean that reasonable restrictions cannot be imposed to prevent unfit persons from possessing firearms or to restrict possession of firearms particularly suited to criminal misuse.").

[3] Whether and to what extent the Bill of Rights should be incorporated into the Due Process Clause of the Fourteenth Amendment is a question that has intrigued many. *See* Felix Frankfurter, *Memorandum on "Incorporation" of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment, 78 Harv. L. Rev. 746 (1965);* Hugo Lafayette Black, A Constitutional Faith, at xvi-vii, 34-42 (1968); William J. Brennan Jr., *The Bill of Rights and the States, 36 N.Y.U. L. Rev. 761 (1961);* William J. Brennan Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights, 61 N.Y.U. L. Rev. 535 (1986); Duncan v. Louisiana, 391 U.S. 145, 171-193, 20 L. Ed. 2d 491, 88 S. Ct. 1444 (1968)* (Harlan, J., dissenting); Erwin N. Griswold, *Due Process Problems Today in the United States, in* The Fourteenth Amendment 161, 164 (Bernard Schwartz ed., 1970); Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment, 101 Yale L.J. 1193 (1992).*

The *Silveira* majority states that *United States v. Cruikshank, 92 U.S. 542, 23 L. Ed. 588 (1876),* and *Presser v. Illinois, 116 U.S. 252, 29 L. Ed. 615, 6 S. Ct. 580 (1886),* cases holding that the Second Amendment is not applicable to the states, "were decided before the Supreme Court held that the Bill of Rights is incorporated by the Fourteenth Amendment's Due Process Clause." *Silveira, 312 F.3d at 1066 n.17.* These remarks of *Silveira* on incorporation are overbroad and inaccurate. Many Amendments of the Bill of Rights have been incorporated against the states. *See, e.g., Duncan v. Louisiana, 391 U.S. 145, 20 L. Ed. 2d 491, 88 S. Ct. 1444 (1968)* (right to criminal jury); *Malloy v. Hogan, 378 U.S. 1, 12 L. Ed. 2d 653, 84 S. Ct. 1489 (1964)* (privilege against compelled self-incrimination; *New York Times Co. v. Sullivan, 376 U.S. 254, 11 L. Ed. 2d 686, 84 S. Ct. 710 (1964)* (freedom of speech and press)); *Abington Sch. Dist. v. Schempp, 374 U.S. 203, 10 L. Ed. 2d 844, 83 S. Ct.*

1560 (1963) (nonestablishment of religion); *Gideon v. Wainwright, 372 U.S. 335, 9 L. Ed. 2d 799, 83 S. Ct. 792 (1963)* (right to counsel); *Mapp v. Ohio, 367 U.S. 643, 6 L. Ed. 2d 1081, 81 S. Ct. 1684, 86 Ohio Law Abs. 513 (1961)* (exclusion of evidence obtained by unreasonable search and seizure). However, the entire Bill of Rights has not been incorporated into the Fourteenth Amendment's Due Process Clause. *See* John E. Nowak & Ronald D. Rotunda, *Constitutional Law* 332-334 (4th ed. 1991).

We have held that the Second Amendment is not incorporated and does not apply to the states. *Fresno Rifle and Pistol Club, Inc. v. Van de Kamp, 965 F.2d 723 (9th Cir. 1992).* If *Fresno* controls, then the Second Amendment cannot be considered to apply to state and local regulation. *Fresno* in turn is grounded on *Cruikshank* and *Presser*. *Silveira* urges that *Cruikshank* and *Presser* have been undermined, asserting that *Barron v. Baltimore, 32 U.S. 243, 8 L. Ed. 672 (1833)* (holding that the Bill of Rights does not apply to the states), on which *Cruikshank* and *Presser* relied, is "now-rejected." *Silveira, 312 F.3d at 1066 n.17.*

Although the Supreme Court has incorporated many clauses of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment, the Supreme Court has never explicitly overruled *Barron*. More importantly, the Supreme Court has never explicitly overruled *Cruikshank* and *Presser*. If reconsideration of *Fresno* is nonetheless permissible, we must ask whether the liberty guaranteed by the Second Amendment is protected by the Due Process Clause of the Fourteenth Amendment. The Due Process Clause of the Fourteenth Amendment protects those liberties which are "deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksberg, 521 U.S. 702, 721, 138 L. Ed. 2d 772, 117 S. Ct. 2258 (1997)* (internal quotation marks and citations omitted). To the extent that the Second Amendment was aimed at maintaining an armed citizenry and local power as a check against the possibility of federal tyranny, that purpose is not directly applicable to the states, and a Second Amendment restraint on the states in this sense is not implicit to the concept of ordered liberty. No single state could foreclose liberty of its citizens when faced with the collective power of the federal government and other states. On the other hand, as *Presser* recognized, the vitality of the Second Amendment's protection for national defense and for preservation of freedom depends on the premise that the states cannot disarm the citizenry. *Presser, 116 U.S. at 264-266* ("It is undoubtedly

Amendment.[4]

Our panel is bound by *Hickman*, and we cannot reach the merits of Nordyke's challenge to Second Amendment. But the holding of *Hickman* can be discarded by our court en banc or can be rejected by the Supreme Court if it decides to visit the issue of what substantive rights are safeguarded by the Second Amendment.[5]

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true that all citizens capable of bearing arms constitute the reserved military force or reserve militia of the United States as well as of the states, and, in view of this prerogative of the general government, as well as of its general powers, the states cannot, even laying the constitutional provision in question out of view, prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security, and disable the people from performing their duty to the general government.") In this respect, maintenance of an armed citizenry might be argued to be implicit in the concept of ordered liberty and protected by the Due Process Clause of the Fourteenth Amendment.

[4] Another potential avenue for incorporation is via the Privileges and Immunities Clause of the Fourteenth Amendment which also may convey restrictions of the Second Amendment on the states. *See* Akhil Reed Amar, *The Second Amendment: A Case Study in Constitutional Interpretation 2001 Utah. L. Rev. 889, 898-899. See also* Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation, 108 Harv. L. Rev. 1221, 1297 n.247 (1995)* (advocating use of the Privileges and Immunities Clause and calling for *Slaughter-House Cases, 83 U.S. 36, 21 L. Ed. 394 (1872),* to be overruled in order to accomplish this goal). I express no view on this theory.

[5] The Supreme Court's Second Amendment cases have displayed limited analysis of the structure and meaning of the Second Amendment. *See generally* 1 Laurence H. Tribe, American Constitutional Law 894-902 (3d ed. 2000). The Supreme Court in any appropriate case, however, may decide to review and clarify Second Amendment theory and application, and, as Justice Thomas has remarked, "determine whether Justice Story was correct when he wrote that the right to bear arms 'has justly been considered, as the palladium of the liberties of a

I write to express disagreement with the "collective rights view" advanced in *Hickman* and *Silveira* because I conclude that an "individual rights view" of the Second Amendment is most consistent with the Second Amendment's language, structure, and purposes, as well as colonial experience and pre-adoption history.[6]

The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. Because the "collective rights" view of *Hickman* and *Silveira* relies on the Second Amendment's introductory clause, it denigrates the right "of the people" and seeks to limit that right to participation in militia activity. The

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republic.' " *Printz v. United States, 521 U.S. 898, 938-939, 138 L. Ed. 2d 914, 117 S. Ct. 2365 (1997)* (Thomas, J., concurring) (quoting 3 Joseph Story, Commentaries § 1890, p. 746 (1833)).

[6] In addition to the Fifth Circuit, *see Emerson, 270 F.3d at 264,* many scholars have reached this conclusion. *See, e.g.,* Don B. Kates, Jr. *Handgun Prohibition and the Original Meaning of the Second Amendment, 82 Mich. L. Rev. 204, 211-43 (1983)* (advocating the individual rights view); Sanford Levinson, *The Embarrassing Second Amendment, 99 Yale L.J. 637, 642 (1989)* (same); Robert E. Shalhope, *The Ideological Origins of the Second Amendment,* 69 J. Am. Hist. 599 (1982) (same); William Van Alstyne, *The Second Amendment and the Personal Right to Arms, 43 Duke L.J. 1236, 1253 (1994)* (same); *but see* Michael C. Dorf, *What Does the Second Amendment Mean Today, 76 Chi.-Kent L. Rev. 291, 294 (2000)* (advocating a collective rights view); Jack N. Rakove, *The Second Amendment: The Highest Stage of Originalism, 76 Chi-Kent L. Rev. 103, 124 (2000)* (same); David Yassky, *The Second Amendment: Structure, History and Constitutional Change, 99 Mich. L. Rev. 588, 597 (2000)* (arguing that "the Founders' overriding concern was to ensure that the new nation's military force would be composed of state militias instead of, or at least in addition to, a federal standing army").

first eight Amendments of the Bill of Rights protect personal rights of the people. The introductory clause of the Second Amendment provides one justification, not the sole one, for the personal right that is granted. The introductory clause cannot properly be read to eliminate the substantive protection of "the right of the people." Limiting the Second Amendment's protection to collective rights of militias affronts the most basic protections of the Second Amendment. The subject of the Second Amendment is the right of the people to keep and bear arms; the text of the Second Amendment protects that right from infringement.

Also, the "collective rights" view of the *Silveira* majority gives too little weight to the Second Amendment's protection of a right to "keep" arms. The *Silveira* majority seeks to enhance collective rights theory by contending that to "bear" arms has a military meaning. *Silveira, 312 F.3d at 1072.* But the Second Amendment's literal terms are conjunctive. The *Silveira* majority urges that "keep and bear" should be read together. *Id. at 1074.* Though the terms are related, the distinct right to "keep" arms is individual and a helpful antecedent to bearing arms in a militia.

The *Silveira* majority also urges that the word "keep" has no independent content because the Second Amendment does not protect a right to "own" or a right to "possess" arms. *Id. at 1072* ("We consider it highly significant, however, that the second clause does not purport to protect the right to 'possess' or 'own', but rather to 'keep and bear' arms."). This argument is not valid. First, ownership is irrelevant. One can keep arms that belong to a friend or relative, and a bailee of arms can protect a homestead or serve in a militia. Second, as for the argument that the Second Amendment doesn't say "possess" arms, consider the American Heritage dictionary's first definition of "keep": "to retain possession of." The American Heritage Dictionary 459 (3d ed. 1974); *see also* Thomas Sheridan, A Complete Dictionary of the English Language (6th ed. 1796) (defining "to keep" as "[t]o retain; to have in custody"); Samuel Johnson, A

Dictionary of the English Language (7th ed. 1785) (defining "to keep" as "to retain; not to lose" and also "[t]o have in custody."). Because literally a right to "keep" arms means a right to possess arms, *Silveira's* argument, to the extent that it rests on a distinction between "keep" and "possess," is not persuasive. Third, *Silveira's* argument that a right to "keep" arms is subordinate to a right to "bear" arms sidesteps the literal conjunctive language of the Amendment and misconstrues the nature of a militia in which ordinary citizens contribute their personal arms to, and risk their lives for, the Nation's defense.

The conclusion that the Second Amendment's language supports an individual right to "keep and bear arms" is strengthened when we consider the nature and meaning of the term "Militia." The Second Amendment's language indicates that the "Militia" rests upon the shoulders of the people. As Professor Akhil Amar has explained, "the militia were the people and the people were the militia." Akhil Reed Amar, *The Second Amendment: A Case Study in Constitutional Interpretation 2001 Utah. L. Rev. 889, 892.* He further explained that an earlier draft of the Amendment recited that the militia would be "composed of the body of the people." *Id.* (*citing* The Complete Bill of Rights 170-173) (Neil H. Cogan, ed., 1997).

Perhaps most importantly, the Second Amendment's purposes strongly support the theory of an individual right to "keep and bear" arms. The Second Amendment serves at least the following two key purposes: (1) to protect against external threats of invasion; and (2) to guard against the internal threat that our republic could degenerate to tyranny.[7] The purpose of militia to oppose external threat and preserve the national

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[7] On the general problem of risks that a democratic republic may not endure, a classic work, first published in 1885 by nineteenth-century legal scholar Sir Henry Sumner Maine, is *Popular Government* (Liberty Classics 1976).

security is apparent from the face of the Second Amendment. The purpose of militia to check potential tyranny of a national government is implicit and is documented by contemporaneous parallel provisions of state constitutions.[8]

This view is also reinforced by English and colonial history. English history shows constant recourse to militia to withstand invading forces that arrived not rarely from England's neighboring lands. *See generally* 2 Winston S. Churchill, History of the English Speaking Peoples: The New World (Dodd, Mead, & Co. 1966); 3 Winston S. Churchill, History of the English Speaking Peoples: The Age of Revolution (Dodd, Mead, & Co. 1967). In the colonies, not only soldiers, but also

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[8] A few examples from state constitutions illustrate the point:

"[T]he people have a right to bear arms, for the defence of the State; and, as standing armies, in time of peace, are dangerous to liberty, they ought not be kept up; and that the military should be kept under strict subordination to, and governed by, the civil power." N.C. Declaration of Rights, § XVII (1776)

"[T]he people have a right to bear arms for the defence of themselves and the state; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up; And . . . the military should be kept under strict subordination, to, and governed by, the civil power." Penn. Const. Declaration of Rights, cl. XIII (1776)

"[T]he people have a right to bear arms for the defence of themselves and the State -- and as standing armies in time of peace are dangerous to liberty, they ought not to be kept up; and . . . the military should be kept under strict subordination to and governed by the civil power." Vt. Const. ch. I., art. 16 (1777)

"[A] well regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defense of a free state; . . . standing armies, in time of peace, should be avoided as dangerous to liberty; and . . . in all cases the military should be under strict subordination to, and governed by, the civil power." Va. Const. art. I., § 13 (1776).

farmers, merchants, and statesmen typically owned weapons, and there can be no doubt that militia played important roles in defending the colonies in the seventeenth and eighteenth centuries and during the revolutionary break with Great Britain.

Those who debated and framed the Bill of Rights were educated in practical political concepts and doubtless recognized that an opening gambit for tyrants is to disarm the public.[9] If the Second Amendment is held to protect only a state-regulated militia, then there would be no constitutional bar to a federal government outlawing possession of all arms by hunters and those with legitimate needs for protection. A general confiscation of guns could become the order of the day. I believe that result is foreclosed by the salient purpose of the Second Amendment to guard against tyranny, and that an individual right to keep and bear arms must be recognized.

It does not follow that such a right is absolute. The Bill of Rights, though robust, must be interpreted in light of societal needs. For example, even the broad protections of free speech in the First Amendment do not protect a person who "falsely shout[s] fire in a theatre and caus[es] a panic." *Schenck v. U.S., 249 U.S. 47, 52, 63 L. Ed. 470, 39 S. Ct. 247, 17 Ohio L. Rep. 149 (1919)* (Holmes, J.). Similarly, the Fourth Amendment's general requirement of a warrant for a search permits exceptions for exigent circumstances. *See Payton v. New York, 445 U.S. 573, 63 L. Ed. 2d 639, 100 S. Ct. 1371 (1980).* And though recognizing an individual right to keep and bear arms, government can within due bounds regulate ownership or use

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[9] "One of the ordinary modes, by which tyrants accomplish their purposes without resistance, is, by disarming the people, and making it an offense to keep arms, and by substituting a regular army in the stead of a resort to the militia. The friends of a free government cannot be too watchful, to overcome the dangerous tendency of the public mind to sacrifice, for the sake of mere private convenience, this powerful check upon the designs of ambitious men." Joseph Story, A Familiar Exposition of the Constitution of the United States § 450, p. 246 (1840).

of weapons for the public good. We would make progress if the Supreme Court were to establish a doctrine of an individual Second Amendment right subject to reasonable government regulation. The decisional chips would thereafter fall where they may on the basis of particular cases and the delicate balance of their precise facts, aided by the complementary efforts of lawyers, scholars and judges.[10] The law would best put aside extreme positions and adopt an assessment of reasonableness of gun regulation, for this would place us on the right track.[11]

Restricting the Second Amendment to "collective rights" of militias and ignoring individual rights of the people betray a key protection against the recurrent tyranny that may in each

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[10] The law develops through interdependent actions of academics advancing theories, advocates championing them in litigation, and Judges making decisions that clarify doctrine. The process is ongoing, for after decisions, academics will critique and offer suggested improvements, advocates will bring cases arguing what Judges said as refined by academic feedback, and more refined decisions result from this process. *See* Hon. Wade H. McCree, Jr., *The Annual John Randolph Tucker Lecture, Partners in a Process: The Academy and the Courts, 37 Wash. & Lee. L. Rev. 811, 1041 (1981).*

[11] In my view it is an error, though understandable one, to view the Second Amendment exclusively or primarily with the issue in mind of whether it constrains gun control. That controversial issue, as important as it may be, can be a distorting lens through which to view the Amendment if it clouds judgment and prevents understanding of the basic purposes of the Second Amendment. Instead, the Second Amendment should be considered in light of its core purposes of protecting the nation's safety from external threat or internal tyranny. However, recognition of individual right in the Second Amendment, to protect national security, is not inconsistent with reasonable regulation, which may be permissible under several theories: (1) all weapons are not "arms" within the meaning of the Second Amendment; (2) "arms" protected may be limited to those consistent with use by an organized military force, as suggested in *Miller*; and (3) important government interests may justify reasonable regulation.

generation threaten individual liberty.[12] The *Silveira* majority takes the position that the Framers' concerns to check the possibility of a Federal government tyranny are sufficiently answered by reading the Second Amendment merely to ensure that the states could not be barred from funding state-organized militia. *Silveira, 312 F.3d at 1085.* I disagree. The Second Amendment cannot properly be interpreted to entrust the freedom of the people to the premise that state governments would arm a self-reliant people and protect the people against a federal tyranny. The practical concept of militia contemplates an armed citizenry capable of rising up, with what arms they hold or can find, to defeat, resist or at minimum delay an invader until more organized power can be marshalled. The likelihood of broad resistance from an armed citizenry is a deterrent to any would be invader. Equally important, the practical concept of militia, embracing an armed citizenry, stands to deter risk of government degradation to tyranny. This concept is weakened by *Silveira's* premise that the citizens could rely on their states to be an arsenal and repository for arms, and otherwise have no right.

The Second Amendment protects not the rights of militias but the rights "of the people." It protects their right not only to "bear arms," which may have a military connotation, but to

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[12] We should instead heed the observations of President John F. Kennedy on the Second Amendment, which have remaining vitality:

"By calling attention to 'a well regulated militia,' the 'security' of the nation, and the right of each citizen 'to keep and bear arms,' our founding fathers recognized the essentially civilian nature of our economy. Although it is extremely unlikely that the fears of governmental tyranny which gave rise to the Second Amendment will ever be a major danger to our nation, the Amendment still remains an important declaration of our basic civilian-military relationships, in which every citizen must be ready to participate in the defense of his country. For that reason I believe the Second Amendment will always be important."

John F. Kennedy, *Know Your Lawmakers*, Guns, April 1960, at 4.

"keep arms," which has an individual one. By giving inadequate weight to the individual right to keep arms, the *Silveira* majority does not do justice to the language of the Second Amendment and disregards the lesson of history that an armed citizenry can deter external aggression and can help avoid the internal danger that a representative government may degenerate to tyranny. The right to "keep and bear arms" is a fundamental liberty upon which the safety of our Nation depends, and it requires for its efficacy that an individual right be recognized and honored.

I reach this conclusion despite a recognition that many may think that these ideas are outmoded, that there is no risk in modern times of our government becoming a tyranny, and that there is little threat that others would invade our shores or attack our heartland. However, the Second Amendment was designed by the Framers of our Constitution to safeguard our Nation not only in times of good government, such as we have enjoyed for generations, but also in the event, however unlikely, that our government or leaders would go bad. And it was designed to provide national security not only when our country is strong but also if it were to become weakened or otherwise subject to attack. As the people bear the risk of loss of their freedom and the pain of any attack, our Constitution provides that the people have a right to participate in defense of the Nation. The Second Amendment protects that fundamental right.

ORDER DENYING REHEARING EN BANC: UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Filed: April 5, 2004

JUDGES: Before: Arthur L. Alarcon, Diarmuid F. O'Scannlain, and Ronald M. Gould, Circuit Judges. KOZINSKI, Circuit Judge, concurring. KLEINFELD, Circuit Judge, dissenting from denial of rehearing. GOULD, Circuit Judge, with whom O'SCANNLAIN, KLEINFELD, TALLMAN, and BEA, Circuit Judges, join, dissenting from denial of rehearing.

OPINION:

ORDER

The panel voted to deny the petition for rehearing. Judges O'Scannlain and Gould voted to grant the petition for rehearing en banc, and Judge Alarcon so recommended. The panel requested a vote of the full court on whether the case should be reconsidered en banc. A majority of the active nonrecused judges of the court failed to vote in favor of rehearing en banc, and the petition is therefore denied. With this order the clerk shall also file Judge Kozinski's concurrence, Judge Kleinfeld's dissent from denial, and Judge Gould's dissent from denial.

The stay of the issuance of the mandate is vacated.

CONCUR BY: KOZINSKI

CONCUR: KOZINSKI, Circuit Judge, concurring:

The concerns raised by Judge Gould's dissent also triggered an en banc call in Silveira v. Lockyer, 312 F.3d 1052 (9th Cir. 2002). After a vigorous exchange of views, the call misfired, 328 F.3d 567 (9th Cir. 2003), and the Supreme Court shot down the petition for certiorari less than six months ago, 157 L. Ed.

2d 693, 124 S. Ct. 803 (2003). Because I believe prudential considerations militate against revisiting the issue quite so soon, I voted against taking this case en banc and so, regretfully, cannot join Judge Gould's bulls-eye dissent.

DISSENT BY: KLEINFELD GOULD

DISSENT: KLEINFELD, Circuit Judge, dissenting from denial of rehearing en banc:

I respectfully dissent. I join fully in Judge Gould's superb dissent, which explains coherently and most admirably why the Second Amendment guarantees an individual right to keep and bear arms.

Our court has erased 10% of the Bill of Rights for 20% of the American people. No liberties are safe if courts can so easily erase them, and no lover of liberty can be confident that an important right will never become so disfavored in popular or elite opinion as to be vulnerable to being discarded like the Second Amendment.

I have spelled out in great detail why our court's view of the Second Amendment is indefensible, in my dissent from denial of rehearing en banc in Silveira v. Lockyer.[1] Judge Gould has graciously noted some of the points in that dissent, and I will not restate them here.

Our court and the Fifth Circuit take opposite views. In United States v. Emerson, the Fifth Circuit reads the Second Amendment to establish an individual right to keep and bear arms.[2] Our court reads it not to. Our court takes what to me is a position verging on droll legal humor, that the right is a

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[1] Silveira v. Lockyer, 328 F.3d 567, 570 (9th Cir. 2003) (Kleinfeld, J., dissenting from denial of rehearing en banc).

[2] United States v. Emerson, 270 F.3d 203 (5th Cir. 2001).

"collective" right belonging to state government, meaning that it is enforceable only by the state, even when the state is the violator.

Whether the Second Amendment guarantees an individual right is more likely to affect the outcome in this case than in Silveira. In Silveira, the challenge was to California's ban on assault weapons. Reasonable regulation of the individual right guaranteed by the Second Amendment might well have led to the same result, no relief, as the result reached by the panel using the "no individual right" argument. In this case, by contrast, the result might well have been different if we had not erased the Second Amendment. The ordinance at issue, subject to narrow exceptions, criminalizes any and all possession of firearms on county property. The case before the panel was about apparently law-abiding persons wanting to hold a gun show at a fairgrounds.

Some people think that the Second Amendment is an outdated relic of an earlier time. Doubtless some also think that constitutional protections of other rights are outdated relics of earlier times. We The People own those rights regardless, unless and until We The People repeal them. For those who believe it to be outdated, the Second Amendment provides a good test of whether their allegiance is really to the Constitution of the United States, or only to their preferences in public policies and audiences. The Constitution is law, not vague aspirations, and we are obligated to protect, defend, and apply it. If the Second Amendment were truly an outdated relic, the Constitution provides a method for repeal. The Constitution does not furnish the federal courts with an eraser.

GOULD, Circuit Judge, with whom O'SCANNLAIN, KLEINFELD, TALLMAN, and BEA, Circuit Judges, join, dissenting from denial of rehearing en banc:

I respectfully dissent from our denial of rehearing en banc. This case presents an important issue of the scope of the

constitutional guarantee of the Second Amendment, arising in the context of state restriction of gun shows. The panel decision in this case, Nordyke v. King, 319 F.3d 1185, 1198 (9th Cir. 2003), was compelled by our circuit's prior holding in Hickman v. Block, 81 F.3d 98 (9th Cir. 1996), in which we embraced a "collective rights" reading of the Second Amendment. I believe Hickman was wrongly decided.[1] An "individual rights" interpretation, as was recently adopted by the Fifth Circuit in United States v. Emerson, 270 F.3d 203 (5th Cir. 2001), consistent with United States v. Miller, 307 U.S. 174, 83 L. Ed. 1206, 59 S. Ct. 816 (1939),[2] is most consistent with the text, structure, purposes, and history of the Second Amendment, as well as colonial experience and pre-adoption history. It also reflects what I consider to be the scholarly consensus that has recently developed on the question of how to best interpret the

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[1] Similarly, for the reasons expressed herein, I am not persuaded by the elaboration of a collective rights view in our circuit's opinion in Silveira v. Lockyer, 312 F.3d 1052 (9th Cir. 2002), cert. denied, 157 L. Ed. 2d 693, 124 S. Ct. 803 (2003). To the contrary I think Silveira continues mistakenly to endorse the ill-advised theory of Hickman.

[2] This is the current view of the United States, as reflected in the United States' opposition to the petition for certiorari filed in Emerson. See Opposition to Petition for Certiorari in United States v. Emerson, No. 01-8780, at 19-20 n.3, available at http://www.usdoj.gov/osg/briefs/2001/0responses/2001-8780.resp.pdf ("The current position of the United States . . . is that the Second Amendment more broadly protects the rights of individuals, including persons who are not members of any militia or engaged in active military service or training, to possess and bear their own firearms, subject to reasonable restrictions designed to prevent possession by unfit persons or to restrict the possession of types of firearms that are particularly suited to criminal misuse."); see also Memorandum from the Attorney General to All United States Attorneys, re: United States v. Emerson (Nov. 9, 2001), available at http://www.usdoj.gov/osg/briefs/2001/0responses/2001-8780.resp.pdf ("In my view, the Emerson opinion . . . generally reflects the correct understanding of the Second Amendment.").

Second Amendment. We should recognize that individual citizens have a constitutional right to keep and bear arms, subject -- in the same manner as all other core constitutional rights -- to certain limits.[3] Thereafter, the chips will fall where they may, and decisions in due course will clarify what is and is not constitutionally permissible regulation, and the further standards for addressing it.

I dissent with recognition that we only recently denied en banc review in a case presenting a similar issue on the scope of the Second Amendment right to keep and bear arms. Silveira v. Lockyer, 312 F.3d 1052 (9th Cir. 2002), reh'g en banc denied, 328 F.3d 567 (9th Cir. 2003), cert. denied, 124 S. Ct. 803 (2003). However, Nordyke differs from Silveira, and is more appropriate for en banc reconsideration of the holding in Hickman. In contrast to Silveira, which involved a challenge to a California law restricting the possession, use, and transfer of assault weapons, 312 F.3d at 1056, a provocative issue, appellants in Nordyke challenged a local ordinance prohibiting the possession of all firearms on county property, which had the effect of foreclosing a traditional gun show. Some may consider that the regulation of assault weapons may implicate too many difficult considerations beyond that of whether the Second Amendment confers an individual or collective right. The ordinance at issue in Nordyke, if it must be tested in light of an individual Second Amendment right, will not raise the same concerns. If the Second Amendment confers an individual right, then the Nordyke gun possession ban presents a better context in which our court might have assessed the constitutionally permissible bounds of gun regulation.

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[3] If this issue, as presented in Nordyke, arises in a similar case in some other circuit, it may also be necessary to consider whether the Second Amendment's protections are incorporated in the Due Process Clause of the Fourteenth Amendment. See Nordyke, 319 F.3d at 1193 n.3 (Gould, J., specially concurring).

I

The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. This statement contains a substantive guarantee and a prefatory clause. The collective rights view of the Second Amendment places undue weight on a confused interpretation of the prefatory clause to reach the conclusion that the Second Amendment grants only a collective right. As I read it, the substantive guarantee of the Second Amendment grants a clear "right" to "the people" to "keep and bear Arms." The prefatory clause states that the purpose of this grant is to ensure a "well regulated Militia," which is "necessary to the security of a free State." As I explain below, the Second Amendment's prefatory clause does not, as advocates of the collective rights view argue, limit the substantive guarantee to persons enrolled in an organized state militia. And even if it were assumed that the Second Amendment's prefatory clause did limit the scope of the substantive guarantee to those in the "militia," the militia should be defined to encompass the people as a whole. The plain meaning of the language of the Second Amendment mandates an individual rights interpretation.

A

The substantive guarantee of the Second Amendment can be broken down into two clauses, recognizing "the right of the people," "to keep and bear arms." Each of these phrases furthers the individual rights interpretation.

As with all of the first eight amendments of the Bill of Rights, the Second Amendment makes clear that its purpose is to grant a right to the people. As used throughout the text of the Constitution, "rights" and "powers" are granted to the people[4],

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[4] With respect to rights and powers of the people, see, e.g., U.S. Const. amend. I ("Congress shall make no law respecting an

whereas government only has "power" or "authority."[5]

The Second Amendment states that the right it provides for is one "of the people." Apart from the Second Amendment, the phrase "the people" appears in four other places in the Bill of Rights.[6] There is no question that "the people," as used in the First, Fourth, Ninth, and Tenth Amendments refers to individuals; it is individuals who are granted the First Amendment right to assemble, are protected by the Fourth

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establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.") (emphasis added); amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.") (emphasis added); amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.") (emphasis added); amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.") (emphasis added).

[5] With respect to the power and authority of government, see, e.g., U.S. Const. art. I, § 1, cl. 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States.") (emphasis added); art. II, § 1, cl. 1 ("The executive Power shall be vested in a President of the United States of America.") (emphasis added); art. III, § 1, cl. 1 ("The judicial Power of the United States, shall be vested in one supreme Court.") (emphasis added); amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.") (emphasis added).

[6] See U.S. Const. amend. I ("the right of the people peaceably to assemble"); amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."); amend. IX ("rights . . . retained by the people"); amend. X ("powers not delegated . . . are reserved to the States, respectively, or to the people").

Amendment against unreasonable search and seizure, and under the Ninth Amendment retain rights not otherwise enumerated in the Constitution. And the Tenth Amendment makes a clear distinction between "the states" and "the people." Against this backdrop, it is hard to imagine that the drafters of the Constitution meant "the people" in the Second Amendment to take on a meaning different from the meaning ascribed to that term throughout the rest of the Bill of Rights.

A clear statement of the United States Supreme Court also guides our interpretation of the phrase "the people." In United States v. Verdugo-Urquidez, 494 U.S. 259, 108 L. Ed. 2d 222, 110 S. Ct. 1056 (1990), the Court pronounced that " 'the people' seems to have been a term of art employed in select parts of the Constitution." Id. at 265. Looking at the term as used in the Bill of Rights, the Supreme Court observed:

> While . . . textual exegesis is by no means conclusive, it suggests that 'the people' protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.

Id. In other words, in the view of the Supreme Court, the term "the people" means the same thing in each of these five Amendments: the individual members of the "national community." A right granted by the Constitution to "the people" is an individual right, not a right that is collective or quasi-collective.

The right granted to the people by the Second Amendment is one to "keep and bear arms." Those who support the

collective rights view maintain that "keep and bear" should be read as a unitary phrase, see Silveira, 312 F.3d at 1074; Michael C. Dorf, What Does the Second Amendment Mean Today?, 76 Chi.-Kent L. Rev. 291, 317 (2000), or that the word "keep," as used in the Second Amendment, has no independent content because the Second Amendment does not protect a right to "own" or to "possess" arms, Silveira, 312 F.3d at 1072 ("We consider it highly significant . . . that the second clause does not purport to protect the right to 'possess' or 'own' arms, but rather to 'keep and bear' arms."). Collective rights supporters argue further that the term "bear arms" refers only to members of an organized militia during actual service. Id. ("Historical research shows that the use of the term 'bear arms' generally referred to the carrying of arms in military service -- not the private use of arms for personal purposes."). These interpretations of "keep and bear arms" are inconsistent with basic principles of constitutional interpretation, and conflict with the historical use and meaning of the words "keep" and "bear."

A respected canon of constitutional construction provides that we should give meaning and force to every individual word in the Constitution. "In expounding the Constitution of the United States, every word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added. . . . No word in the instrument, therefore, can be rejected as superfluous or unmeaning . . ." Holmes v. Jennison, 39 U.S. (14 Pet.) 540, 570-71, 10 L. Ed. 579 (1840); see also Wright v. United States, 302 U.S. 583, 588, 82 L. Ed. 439, 58 S. Ct. 395, 86 Ct. Cl. 764 (1938). To read "keep and bear" as a unitary phrase, the purported meaning of which turns solely on an interpretation of "bear," or to view "keep" as having no independent content, is wrong because it contravenes this long-accepted rule of construction. The phrase "keep and bear" is written in the conjunctive, and the most literal reading of this phrase is that it grants the people separate rights both to keep and to bear arms.

I also disagree with the conclusion of collective rights proponents that the term "bear arms" has only military connotations. In Emerson, the Fifth Circuit conducted an extensive analysis of the use of "bear arms" in early state constitutions and declarations of rights. 270 F.3d at 230 & n.29. From this analysis, the Emerson court concluded that early nineteenth century constitutions and declarations of rights in at least ten different states gave "people" or "citizens" the right to "bear arms" in their own personal defense. Id. Such widespread use of the phrase "bear arms" in state grants of individual rights undercuts the argument that the drafters of the Second Amendment chose this phrase as a manner of indicating a collective right.

However, even if "bear" is presumed to have a military definition, the Second Amendment's further use of the word "keep" takes the scope of the Second Amendment beyond the right to bear arms in military defense. Had the drafters of the Second Amendment intended only to grant the people a right to carry arms while serving in the organized militia, the use of "bear" alone would have been sufficient.[7] The most common definition of "keep," both today as well as at the time the Second Amendment was drafted, is to have custody or possession of. See The American Heritage Dictionary 459 (3d ed. 1994) (defining "keep" as "to retain possession of");

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[7] In concluding that "keep" has no independent meaning, the Silveira court found it to be "highly significant" that the Second Amendment "does not purport to protect the right to 'possess' or 'own' arms, but rather to 'keep and bear' arms." 312 F.3d at 1072. I also find the use of the word "keep" (which, as I note infra, is a synonym of "possess") to be "highly significant," albeit for different reasons. The use of "keep," as opposed to "own" shows that ownership is irrelevant for purposes of the Second Amendment. One's right to keep or possess arms is independent from ownership. The Second Amendment protects not only the rights of arms owners, but also the rights of persons who keep or act as the bailees of arms that belong to friends or relatives.

Thomas Sheridan, A Complete Dictionary of the English Language (6th ed. 1796) (defining "to keep" as "to retain; to have in custody"); Samuel Johnson, A Dictionary of the English Language (7th ed. 1785) (defining "to keep" as "to retain; not to lose" and also "to have in custody"). Literally, a right to "keep" arms means a right to possess arms. And this right to possess arms goes beyond possession in military service. Colonial statutes often required those otherwise exempt from military service to "keep" arms, and also affirmatively prohibited blacks and Native Americans, persons then excluded from the militia, from "keeping" arms. See Silveira v. Lockyer, 328 F.3d 567, 574 (9th Cir. 2003) (hereinafter Silveira II) (Kleinfeld, J., dissenting from denial of rehearing en banc).[8]

B

The Second Amendment's prefatory clause states: "A well regulated Militia, being necessary to the security of a free State." As the Second Amendment's substantive guarantee confers an individual right to keep and bear arms, the question is whether the language of the Amendment's preamble modifies the right conferred by the substantive guarantee to limit it to a "collective" right. I am convinced that it does not.

Supporters of a collective rights interpretation read the term "militia" as used in the Second Amendment to mean "essentially a state military entity," and "not some amorphous body of the people as a whole." Silveira, 312 F.3d at 1070-72. However, the Second Amendment's language indicates that the

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[8] Further support for the position that "keep" connotes an individual, and not a collective, right to possess arms comes from the briefing in Emerson. As the opinion in that case notes, neither the government, which was then arguing for a collective rights interpretation of the Second Amendment, nor the amici in support of the government's position maintained that "keep" commanded a military meaning. Emerson, 270 F.3d at 232.

"Militia" rests upon the shoulders of the people. And protecting the right of an individual to keep and bear arms certainly serves the Second Amendment's prefatory goal. Allowing citizens to keep arms furthers the effectiveness of a well-regulated militia, which is in turn necessary to the security of a free state. In the words of Professor Ākhil Reed Amar, "the eighteenth-century 'militia' referred to by the [Second Amendment] was not remotely like today's National Guard. It encompassed virtually all voters -- like today's Swiss militia -- rather than a small group of paid, semi-professional volunteers." Akhil Reed Amar, The Second Amendment: A Case Study in Constitutional Interpretation, 2001 Utah L. Rev. 889, 891 (2001). Stated another way, at the time that the Constitution was drafted, "the militia were the people and the people were the militia." Id. at 892.[9]

This interpretation is also consistent with the purposes and structure of the Second Amendment. The Second Amendment serves purposes: (1) to protect against external threats of invasion; and (2) to guard against internal threats to our republic. As I wrote previously in this case:

> The practical concept of militia contemplates an armed citizenry capable of rising up, with what arms they hold or can find, to defeat, resist or at minimum delay an invader until more organized power can be marshalled. The likelihood of broad resistance from an armed citizenry is a deterrent to any would be invader. Equally important, the practical concept of militia, embracing an armed citizenry, stands to deter risk of government degradation to tyranny.

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[9] Professor Amar further explains that an earlier draft of the Second Amendment recited that the "militia" would be "composed of the body of the people." Id. (citing The Complete Bill of Rights 170-73) (Neil H. Cogan ed., 1997)."

Nordyke, 319 F.3d at 1198 (Gould, J., specially concurring). The text of the Second Amendment makes clear the purpose to oppose foreign threats and preserve national security. The purpose of the militia to stand against the potential tyranny of the domestic government is implicit and is documented by contemporaneous parallel provisions of state constitutions and declarations of rights.[10]

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[10] Numerous early state constitutions expressly recognized the risk of tyranny by a domestic government and the need for an independent militia to stand ready to check this threat. See, e.g., Ind. Const. art. I, § 20 (1816) ("That the people have a right to bear arms for the defence of themselves and the State; and that the military shall be kept in strict subordination to the civil power."); N.C. Declaration of Rights § XVII (1776) ("The people have a right to bear arms, for the defence of the State, and, as standing armies, in time of peace, are dangerous to liberty, they ought not be kept up; and that the military should be kept under strict subordination to, and governed by, the civil power."); Ohio Const. art. VIII, § 20 (1802) ("That the people have a right to bear arms for the defense of themselves and the State; and as standing armies, in time of peace, are dangerous to liberty, they shall not be kept up, and that the military shall be kept under strict subordination to the civil power."); Penn. Const., Declaration of Rights, cl. XIII (1776) ("The people have a right to bear arms for the defence of themselves and the state; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up; And . . . the military should be kept under strict subordination, to, and governed by, the civil power."); Vt. Const., ch. I, art. 16 (1777) ("The people have a right to bear arms for the defence of themselves and the State -- and as standing armies in time of peace are dangerous to liberty, they ought not to be kept up; and . . . the military should be kept under strict subordination to and governed by the civil power."); Va. Const., art. I, § 13 (1776) ("[A] well-regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defense of a free state; . . . standing armies, in time of peace, should be avoided as dangerous to liberty; and . . . in all cases the military should be under strict subordination to, and governed by, the civil power."). That these early state constitutions recognized the risk of governmental tyranny reinforces the conclusion that the Second Amendment must be viewed with that risk in mind. See, e.g., Locke v. Davey, 158 L. Ed. 2d 1, 124 S. Ct. 1307, 1314 (2004) ("That early state constitutions saw no problem in explicitly excluding only the ministry

Judge Kozinski has cautioned that we not "fall[ ] prey to the delusion . . . that ordinary people are too careless and stupid to hold guns, and we would be far better off leaving all weapons in the hands of professionals on the government payroll. . . . The simple truth -- born of experience -- is that tyranny thrives best where government need not fear the wrath of an armed people." Silveira II, 328 F.3d at 569 (Kozinski, J., dissenting from denial of rehearing en banc). Judge Kozinski documents his argument persuasively, noting the "sorry history" of our nation when disarmament was used in the South to subjugate slaves, and blacks who had been freed. Judge Kozinski also brought home the risks of tyranny by relating these risks to totalitarian regimes infamous in twentieth century history, explaining that:

> All too many of the other great tragedies of history -- Stalin's atrocities, the killing fields of Cambodia, the Holocaust, to name but a few -- were perpetrated by armed troops against unarmed populations. Many could well have been avoided or mitigated, had the perpetrators known their intended victims were equipped with a rifle and twenty bullets apiece. . . . If a few hundred Jewish fighters in the Warsaw Ghetto could hold off the Wehrmacht for almost a month with only a handful of weapons, six million Jews armed with rifles could not so easily have been herded into cattle cars.

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from receiving state dollars reinforces our conclusion that religious instruction is of a different ilk.").

Id. at 569-70.[11]

Id. at 570.

And as I wrote in my separate concurrence in this case:

> Those who debated and framed the Bill of Rights were educated in practical political concepts and doubtless recognized that an opening gambit for tyrants is to disarm the public. If the Second Amendment is held to protect only a state-regulated militia, then there would be no constitutional bar to a federal government outlawing possession of all arms by hunters and those with legitimate needs for protection. A general confiscation of guns could become the order of the day. I believe that result is foreclosed by the salient purpose of the Second Amendment to guard against tyranny, and that an individual right to keep and bear arms must be recognized.[12]

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[11] Judge Kozinski elaborates further that:

The prospect of tyranny may not grab the headlines the way vivid stories of gun crime routinely do. But few saw the Third Reich coming until it was too late. The Second Amendment is a doomsday provision, one designed for those exceptionally rare circumstances where all other rights have failed -- where the government refuses to stand for reelection and silences those who protest; where courts have lost the courage to oppose, or can find no one to enforce their decrees. However improbable these contingencies may seem today, facing them unprepared is a mistake a free people get to make only once.

[12] See also Thomas Cooley, The General Principles of Constitutional Law 281-82 (2d ed. 1891):

It may be supposed from the phraseology of [the Second Amendment]

Nordyke, 319 F.3d at 1196-97 (Gould, J., specially concurring).

However, even if I were to assume that the prefatory clause did modify the Second Amendment's substantive guarantee, I would still reach the conclusion that the Second Amendment guarantees an individual right. The First Militia Act of 1792, 1 Stat. 271 (1792), passed only a few years after ratification of the Constitution, provides a contemporaneous window on the accepted meaning of the term "militia" at the time the Constitution was drafted. This point has been well explained by Judge Kleinfeld:

> The Second Amendment was ratified in 1791. The next year, Congress enacted the Militia Act, implementing the Amendment and incorporating the general understanding of the time as to what the word meant, and establishing that the militia was indeed what [Silveira] says it was not -- an "amorphous body of the people as a whole." The Militia Act of 1792 defined the "militia" as: "each

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that the right to keep and bear arms was only guaranteed to the militia; but this would be an interpretation not warranted by the intent. The militia, as has been elsewhere explained, consists of those persons who, under the law, are liable to the performance of military duty, and are officered and enrolled for service when called upon. But the law may make provision for the enrolment of all who are fit to perform military duty, or of a small number only, or it may wholly omit to make any provision at all; and if the right were limited to those enrolled, the purpose of this guaranty might be defeated altogether by the action or neglect to act of the government it was meant to hold in check. The meaning of the provision undoubtedly is, that the people, from whom the militia must be taken, shall have the right to keep and bear arms, and they need no permission or regulation of law for the purpose.

> and every free able-bodied white male citizen of the respective states, resident therein, who is or shall be of the age of eighteen years, and under the age of forty-five years." Thus, contrary to the "collective rights" notion in [Silveira], the militia was precisely not "a state entity, a state fighting force," limited to those who are active members of such a collective organization. It was all the able-bodied white male citizens from 18 to 45, whether they were organized into a state fighting force or not."

Silveira II, 328 F.3d at 578 (Kleinfeld, J., dissenting from denial of rehearing en banc) (footnotes omitted).[13]

The definition of "militia" provided in the First Militia Act is also consistent with the present federal statutory definition of that term, 10 U.S.C. § 311:

> Today the United States Code still defines the term "militia." The modern statute, instead of narrowing the militia to an organized body of regularly supervised and trained part time soldiers, broadens the term. The statute specifies that the "militia" consists not only of the "organized" militia, consisting of the National Guard and the Naval Militia, but also an "unorganized militia." The "unorganized militia" is precisely what [Silveira] says it is not, "an amorphous body of the people as a whole." Now, instead of being limited to white male citizens between 18 and 45, the militia has (of course) no racial restriction. Non-citizens are

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[13] The racially restrictive definition of "militia" used in the First Militia Act of course would now clearly violate the Fourteenth Amendment and potentially violate the Thirteenth Amendment, as well as offend our sensibilities.

> now included, provided they have declared an intention to become citizens. The sex restriction is gone and females are included if they are members of the National Guard. People become part of the militia now at age 17 instead of 18. The only narrowing of the statutory scope is that we are no longer required by law to own and furnish guns, ammunition, and bayonets. So now the militia consists not only of all white male citizens between 18 and 45, but also all able-bodied non-white males, whether citizens or non-citizens declared for citizenship, between 17 and 45, and all females in the National Guard. Those of us who are male and able-bodied have almost all been militiamen for most of our lives whether we know it or not, whether we are organized or not, whether our state governments supervised our possession and use of arms or not.

Silveria II, 328 F.3d at 581 (Kleinfeld, J., dissenting from denial of rehearing en banc) (footnote omitted).

Furthermore, the Supreme Court has also had opportunity to expound on the historical meaning of the word "militia." In United States v. Miller, 307 U.S. 174, 83 L. Ed. 1206, 59 S. Ct. 816 (1939), the most recent Supreme Court precedent interpreting the Second Amendment, the Court devoted a substantial portion of its opinion to a discussion of the scope of the "militia." Id. at 178-82. Looking to "the debates in the [Constitutional] Convention, the history and legislation of the Colonies and States, and the writings of approved commentators," id. at 179, the Supreme Court concluded that the militia referred to by the Second Amendment was neither an organized fighting force nor a formal state military entity, id. at 178-79 ("The sentiment of the time strongly disfavored standing armies; the common view was that adequate defense of country and laws could be secured through the Militia -- civilians

primarily, soldiers on occasion."). In the words of the Court: "the Militia comprised all males physically capable of acting in concert for the common defense. A body of citizens enrolled for military discipline."[14] Id. at 179; see also Silveira II, 328 F.3d at 577-78 (Kleinfeld, J., dissenting from denial of rehearing en banc).

I do not read the prefatory clause of the Second Amendment to limit the scope of the substantive guarantee of the right to keep and bear arms. Even if a limiting purpose is attributed to the prefatory clause's reference to "militia," the First Militia Act, the current federal statutory definition of "militia" and the Supreme Court's review of the historical meaning and purpose of the militia at the time of the framers are in accord that a "militia" is not restricted to the organized state military. Instead, these authorities support the conclusion that the militia consists

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[14] Despite this language, the Silveira opinion concludes that Miller "strongly implies that the Supreme Court rejects the traditional individual rights view." 312 F.3d at 1061. I believe this conclusion to be in error.

In Emerson, the Fifth Circuit conducted an extensive analysis of the briefing before the Supreme Court in Miller. 270 F.3d at 221-27. This analysis of Emerson, is thoughtful and accurate. The Fifth Circuit found the government's briefing in Miller to present two arguments: first, a broad constitutional argument that the Second Amendment protects only a collective right to keep and bear arms; and second, a case-specific argument that the Second Amendment protects only arms with a military or defense purpose and not "those weapons which are commonly used by criminals." 270 F.3d at 222. Comparing the holding of Miller to these arguments, Emerson concludes that Miller was decided on the second of the government's arguments, and that Miller therefore does not implicitly endorse the collective rights view of the Second Amendment. 270 F.3d at 224; see Miller, 307 U.S. at 178 (concluding that "in the absence on any evidence tending to show that possession or use of a [sawed-off shotgun] at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument").

of everyday civilians from a broad swath of the population. It is by granting these ordinary civilians the right to keep and bear arms that the Second Amendment aims to further the effectiveness of a "well-regulated militia," which in turn is "necessary to the security of a free State."

II

Historical analysis also supports the conclusion that the framers of the Bill of Rights intended for the Second Amendment to create an individual right to keep and bear arms. The Fifth Circuit devoted a substantial portion of the Emerson opinion to a detailed review of the debate between the Federalists, those in favor of a strong federal government, and Anti-Federalists, those skeptical of a powerful government, over the strength of the federal government established by the Constitution. See 270 F.3d at 236-51. A summary of the history of the Bill of Rights shows that contemporaneous concern over the strength of the federal government led to the creation of an individual right to keep and bear arms in the Second Amendment.

Although the government contemplated by the Constitution was one of limited, enumerated powers, the Anti-Federalists feared that the federal government would use its power to infringe on the fundamental rights of the people. One concern was the federal government's broad military power under the Constitution, including the power to call forth and organize the militia, U.S. Const. art. I, § 8, cl. 15, 16, and the power to raise and support a standing army, U.S. Const. art. I., § 8, cl. 12. The Anti-Federalists worried that this power could be used to control or destroy the militia, and that a tyrannical federal government could further use this power to leave the states and their citizens defenseless against the federal government's

transgressions.[15]

The concerns of the Anti-Federalists did not stop adoption of the Constitution, which was soon ratified by the required nine states. However, these concerns did persuade the first Congress to consider the need to amend the Constitution to include a Bill of Rights. During consideration of what eventually became the Second Amendment, the Senate rejected a proposed amendment that would have granted states the power to arm and train their own militias. See Emerson, 270 F.3d at 249. In other words, the Senate expressly rejected an amendment proposing language that would support a collective rights view of the Second Amendment. The rejection of this proposed collective rights amendment and the concerns of Anti-Federalists regarding the federal government's broad military power under the unamended Constitution show that the first Congress saw the Second Amendment as protecting an individual right to keep and bear arms.

Contemporaneous legal commentary further shows that persons living in the late eighteenth and nineteenth centuries viewed the Second Amendment as conferring an individual right. In Emerson, the Fifth Circuit reviewed late-eighteenth century discourse regarding the Second Amendment. 270 F.3d at 251-55. The statements referred to by the Emerson court reveal a strong belief that the Second Amendment aimed for the protection of individual rights. Id. Similarly, in his well-written dissent from denial of rehearing en banc in Silveira, Judge Kleinfeld quotes from the writings of early nineteenth century commentators William Rawle and Justice Joseph Story, both of whom understood the Second Amendment to protect individual rights position. See Silveira II, 328 F.3d at 584-85 (Kleinfeld, J., dissenting from denial of rehearing en banc).

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[15] For a summary of concerns of leading anti-Federalists, including Patrick Henry and George Mason, see Emerson, 270 F.3d at 237-39, nn. 39-45.

In A View of the Constitution of the United States of America, Rawle wrote of the Second Amendment that "the prohibition is general. No clause of the Constitution could by any rule of construction be conceived to give congress a power to disarm the people." William Rawle, A View of the Constitution of the United States of America, 125-26 (2d ed. 1829). Similarly, Justice Story emphasized that "the right of the citizens to keep, and bear arms has justly been considered, as the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers; and will generally, even if these are successful in the first instance, enable the people to resist, and triumph over them." 3 Joseph Story, Commentaries on the Constitution § 1890 (1833).[16]

III

The individual rights view of the Second Amendment has also "enjoyed recent widespread academic endorsement." Nordyke, 319 F.3d at 1191. Scholars with such wide-ranging views as Laurence Tribe, Akhil Reed Amar, William Van Alstyne, and Eugene Volokh have come to a consensus that the Second Amendment protects an individual right to keep and bear arms.

In the most recent edition of his leading treatise, Professor Tribe sets forth that the "central object" of the Second Amendment "is to arm 'We the People' so that ordinary citizens can participate in the collective defense of their community and their state." 1 Laurence Tribe, American Constitutional Law

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[16] Judge Kleinfeld also aptly reviewed our Constitution's historical antecedents, including the English Declaration of Rights and William Blackstone's Commentaries on the Laws of England. Silveira II, 328 F.3d at 582-84. These predecessor texts recognized a private individual right to bear arms, and support that the framers of the Bill of Rights crafted the Second Amendment to protect individual, and not merely collective, rights.

902, n. 221 (3d ed. 2000). According to Professor Tribe, the Second Amendment achieves this purpose "by assuring that the federal government may not disarm individual citizens without some unusually strong justification consistent with the authority of the states to organize their own militias. That assurance in turn is provided through recognizing a right (admittedly of uncertain scope) on the part of individuals to possess and use firearms in the defense of themselves and their homes. . . ." Id.

Other commentators are in accord with Professor Tribe's conclusion. Professor William Van Alstyne writes that the Second Amendment "looks to an ultimate reliance on the common citizen who has a right to keep and bear arms rather than only to some standing army, or only to some other politically separated, defined, and detached armed cadre, as an essential source of security of a free state. In relating these propositions within one amendment, moreover, it does not disparage, much less does it subordinate, 'the right of the people to keep and bear arms.' " William Van Alstyne, The Second Amendment and the Personal Right to Arms, 43 Duke L.J. 1236, 1243 (1994). Professor Amar adds that the Second Amendment recognizes the view of its framers that "rather than placing full confidence in a standing army filled with aliens, convicts, vagrants, and mercenaries -- who do not truly represent the electorate, and who may pursue their own agendas -- a sound republic should rely on its own armed citizens -- a 'militia' of 'the people'." Amar, supra, at 892.[17] The better view in the contemporary debate supports an individual right to keep

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[17] For further commentary, see Don B. Kates, Jr., Handgun Prohibition and the Original Meaning of the Second Amendment, 82 Mich. L. Rev. 204, 211-43 (1983); Sanford Levinson, The Embarrassing Second Amendment, 99 Yale L.J. 637, 642 (1989); Robert E. Shalhope, The Ideological Origins of the Second Amendment, 69 J. Am. Hist. 599 (1982); Eugene Volokh, The Commonplace Second Amendment, 73 N.Y.U. L. Rev. 793 (1998).

and bear arms, subject as with all other core constitutional rights to reasonable restrictions that pass constitutional scrutiny.

IV

The Second Amendment protects the right "of the people." It protects the people's right not only to "bear arms," which may be read as having a military connotation, but also to "keep arms," which can only be interpreted as having an individual one. By rejecting the individual right to keep arms, Hickman fails to do justice to the language of the Second Amendment. Hickman also disregards the important lesson of history that an armed citizenry can both repel external aggression and check the danger of an internal government degenerating to tyranny.

I do not think that individual rights under the Second Amendment are outmoded, for reasons expressed in my earlier concurrence in this case: "[The Second Amendment] was designed to provide national security not only when our country is strong but also if it were to become weakened or otherwise subject to attack. As the people bear the risk of loss of their freedom and the pain of any attack, our Constitution provides that the people have a right to participate in defense of the Nation. The Second Amendment protects that fundamental right." Nordyke, 319 F.3d at 1198 (Gould, J., specially concurring).

THE DISTRICT COURT'S ORDER DENYING PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Filed: November 3, 1999

[The District Court's Order is currently unpublished, this is a verbatim transcription of the order. Original page designation is set forth in brackets and preceded by an *]

INTRODUCTION

Russell Allen and Sally Ann Nordyke (collectively "Plaintiffs") have moved the Court for a temporary restraining order seeking to prohibit application of an ordinance enacted by the Alameda County Board of Supervisors ("Defendants")[1]. The ordinance bans the possession of firearms on County property. Plaintiffs plan to hold a trade show including guns at the County Fairgrounds on November 6 – 7, 1999. They argue that the ordinance will violate their First Amendment free-speech rights at the show because their vendors and patrons will be unable to display or possess guns during the show. They also argue that the ordinance is invalid, in that it allegedly seeks to regulate in a subject matter area preempted from local legislative action by pre-existing state law. As set forth in [*2] this memorandum and order, the Court finds neither line of argument even fairly likely to yield success on its ultimate merits, and accordingly DENIES plaintiffs' motion for temporary restraining order and preliminary injunction.

FACTUAL BACKGROUND

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[1]Defendants are individual members of the Alameda County Board of Supervisors, the Board as an entity, and Alameda County.

The Alameda County ordinance, which became effective October 28, 1999, provides in pertinent part that anyone who "brings onto or possesses on county property a firearm, loaded or unloaded, or ammunition for a firearm" guilty of a misdemeanor. Alameda County Ordinance No. 9.12.120 (b). This is the extent of the language contested by plaintiffs.[2] The county Board of Supervisors made specific factual findings justifying the ordinance. See id at 9.12.120(a). The ordinance responds generally to the "epidemic proportions" of gun violence in Alameda County. Id. By enacting the ordinance, the County intends to "promote the public health and safety by contributing to the reduction of gunshot fatalities in injuries in the County." Id. The ordinance also specifically responds to a July 4, 1998 shooting at the fairgrounds during the annual County Fair. See Id. Several people were injured by gunshots and panic resulted. See Id.

Plaintiffs, doing business as TS Trade Shows, has been conducting periodic trade shows at the Alameda County Fairgrounds since 1991. T S Trade Shows typically rents the Fairgrounds several times a year for shows. The average attendance for the shows is approximately 4000 persons, and revenues to the Fairgrounds from the shows through building rental fees, parking fees and food sales accrues to approximately $78,000 per calendar year. Complaint,¶ 27. In addition to firearm sales, these shows typically feature the sale of coins, knives, ammunition, camping equipment, gun safes, jewelry, antiques, militaria, artwork, food, toys, T-shirts and bumper stickers. Complaint, ¶ 10. Political and community organizations are also provided a forum to display and advocate

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[2] The proposed ordinance is a revision of an existing Ordinance Code No. 9.12.120. The language quoted here from 9.12.120(b) is the full extent of the operative language creating a new misdemeanor. Other proposed revisions in the ordinance discuss findings, definitions and exceptions. The ordinance took effect on October 28, 1999.

their views. Id. As enacted, the ordinance would prevent the presence of firearms at the show, but not their purchase or sale. Similarly, demonstrations, workshops and discussions regarding firearms would go unaffected by the ordinance, insofar as they do not involve the actual use of guns [*3] or ammunition. The Alameda County Fairgrounds is situated within a public and institutional zoning district on unincorporated county property within the City of Pleasanton. A non-profit corporation, the Alameda County Fair Association, manages the Fairgrounds through an Operating Agreement with Alameda County. Complaint, ¶ 20-22.

Plaintiffs have previously challenged, with success, a lease addendum in Santa Clara County that prohibited tenants of the county fairgrounds from "offering for sale . . . firearms or ammunition to any other person at a gun show at the fairgrounds." Nordyke v. Santa Clara County, 110 F.3d 707, 710 (9th Cir. 1997). The Ninth Circuit affirmed the district court's finding that the lease addendum unconstitutionally restricted protected commercial speech associated with the purchase and sale of guns. See id. At 713.

LEGAL ANALYSIS

I. Legal Standard

Plaintiffs have sought both a temporary restraining order and a preliminary injunction.[3] Federal Rule of Civil Procedure

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The timing of plaintiffs TRO is quite odd. The TRO application was filed over five weeks before the show itself, and four weeks before the ordinance itself actually became law. In an effort to circumvent the problem that a TRO is ordinarily of limited duration (10 days), plaintiffs sought a "springing" TRO, which would be grantee in early October but only take effect on October 28. The "springing TRO" is a beast unknown to this court, and were it recognized would essentially circumvent the purpose for which

65 sets forth the procedure for issuance of a preliminary injunction or temporary restraining order. The movants must demonstrate either a combination of probable success on the merits and the possibility of irreparable injury, or that serious questions are raised and the balance of hardships tips sharply in their favor. See Diamontiney v. Borg, 918 F.2d 793, 795 (9th Cir. 1990): Alaska v. Native Village of Venetie, 856 F.2d 1384, 1388 (9th Circ. 1988); American Motorcyclist Ass'n v. Watt, 714 F.2d 962, 965 (9th Cir. 1983). These two formulations represent [*4] two points on a sliding scale in which the required degree of a irreparable harm increases as the probability of success decreases. See Diamontiney, 918 F.2d at 795. Under either formulation, however, the moving party must at least show a fair chance of success on the merits. See Armstrong v. Mazurek, 94 F.3d 566, 567 (9th Cir. 1996).[4]

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temporary relief, as opposed to injunctive relief, is granted. Another flaw in the plaintiffs' TRO showing is that the claimed irreparable harm was based on a $6,000 deposit to be made to Fairground authorities in mid-October to hold the Grounds for the November 6 – 7 show. However, as defendants point out, financial injury is not a proper basis for showing of irreparable harm, since financial injury is by its nature repairable by adequate remedies at law. See, e.g., Colorado River Indian Tribes v. Town of Parker, 776 F.2d 846, 850 (9th Cir. 1985). Furthermore, the Fairgrounds are managed by a separate authority, the Alameda County Fair Association, which is not a party to this suit. The logic of enjoining defendants, who would neither inflict the harm pled as the rule 65 basis for the motion, nor reap the benefits gained by that harm, is lost on the Court. By consolidating the TRO and preliminary injunction motions, the court has reached the merits of this action and a suitable procedural time frame.

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Defendants have also raised the question of plaintiffs' standing. Standing is an essential, core component of the case or controversy requirement. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). Plaintiffs must demonstrate three elements which constitute the "irreducible constitutional minimum" of Article III standing. Id. at 560. First, plaintiffs must have suffered an "injury-in-fact" to a legally protected interest that is both "concrete and particularized" and "actual or imminent," as opposed to "'conjectural' or 'hypothetical.'" Second, there must be a causal connection

II. First Amendment

The Fourteenth Amendment incorporates the First Amendment, and applies its protections to state and local government action. See U.S. Const. Amend. XIV. This precludes state and local governments from abridging the freedom of speech. See U.S. Const. Amend I. The ordinance at issue here implicates the freedom of speech in two ways. First, it affects the conduct of show attendees by prohibiting the possession of guns on public grounds. Vendors, exhibitors and

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between their injury and the conduct complained of. Third, it must be "likely" – not merely "speculative" – that their injury will be "redressed by a favorable decision." Id. at 560-61.

Plaintiffs meet these three minimal standing requirements. In past years, guns have been present at the trade shows. If the ordinance is enforced, the show will be affected because vendors with significant displays of or reliance on the possession of guns likely will not attend. Plaintiffs likely do not have time to find substitute vendors. The likely diminished attendance would be a concrete injury and more than 'conjectural.' Further, the injury is causally connected to the enforcement of the ordinance, and a court order barring enforcement of the ordinance would redress this injury.

In addition to the three constitutional requirements to standing the Supreme Court restricts a litigant's ability to assert the rights of a third-party. See Craig v. Boren, 429 U.S. 190, 193 (1976). In Craig, the Court broadened this requirement to allow the assertion of third-party rights where "those concomitant rights of third parties... would be "diluted or adversely affected" should [the litigant's] constitutional challenge fail and the statutes remain in force." Id. at 195, citing Griswold v. Connecticut, 381 U.S. 479, 381 (1965), and Note, Standing to Assert Constitutional Jus Tertii, 88 Harv. L. Rev. 423, 432 (1974). The Ninth Circuit interpreted this conclusion in Hong Kong Supermarket v. Kizer, 839 F.2d 1078 (9th Cir. 1987). The court stated that the assertion of third party rights is permissible where "the relationship between the litigant and a third parties whose rights he asserts "was not simply the fortuitous connection between a vendor and potential vendees, but the relationship between one who acted to protect the rights of a minority and a minority itself." Id. at 1081, Citing Eisenstadt v. Baird, 405 U.S. 438, 445 (1972). For purposes of this motion, the plaintiffs are presumed to meet the standard necessary to assert the rights of venders, exhibitors and patrons under Craig and its progeny.

attendees will not be able to display or handle most guns, although they still may exercise their right to express views concerning guns. Plaintiff's Br. at 4. Moreover, expressive conduct may fall within the scope of the First Amendment where "that conduct 'may be sufficiently inbued with elements of [*5] communication.'" Texas v Johnson, 491 U.S. 397, 404 (1989), quoting Spence v. Washington, 418 U.S. 405, 409 (1974). The question the Court faces is whether possession of a gun is itself expressive conduct, and, if so, if it is imbued with elements of communication sufficient to trigger First Amendment protections.

Second, the ordinance may impact commercial speech, either directly or indirectly. Attendees will not be able to buy and sell guns in the same manner without the guns present. Potential buyers will not be able to inspect a gun before buying it and sellers will not be able to highlight its features by displaying the actual gun. Commercial speech is under certain circumstances afforded First Amendment protection. See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976). Also, the sale of merchandise which carries or constitutes a political, religious, philosophical or ideological message is fully protected, noncommercial speech. See Gaudiya Vaishnava Society v. City and County of San Francisco, 952 F.2d 1059, 1066, (9th Cir. 1991). Thus, the Court's other substantive inquiry focuses on the relationship between the possession of guns and the purchase and sale of guns, and whether the two implicate, either separately or together, First Amendment interests.

A. Expressive Conduct

1. Is Expressive Conduct Implicated By the Ordinance?

The first question for this Court is whether possession

of a gun on public property is expressive conduct protected by the First Amendment. A survey of constitutional jurisprudence demonstrates that, in limited circumstances, acts without words can be considered speech for First Amendment purposes. In Texas v. Johnson, 491 U.S. at 410, the Court held a Texas state anti-flag burning statute unconstitutional. The Court first concluded that the burning of an American flag was expressive conduct. Id. at 406. The Court considered the flag itself to be "pregnant with expressive content" and found it "readily signifies this nation." Id. at 405. Johnson's burning of the flag was intended to communicate a specific idea, political in nature. Id. at 406. The act, therefore, was sufficiently communicative in and of itself to implicate the First Amendment. Id. In U.S. v. O'Brien, the Court concluded, albeit in dicta, that the burning of the selective service registration card carried a protected symbolic message. See U.S. v. O'Brien, 391 U.S. 367, 376 (1968).

[*6] In contrast to expressive conduct one would uniformly associate with the act of burning our Nation's flag or even a selective service card, possession of a firearm is not an act sufficiently communicative in and of itself to carry a plainly representative or symbolic significance. The record before the court is bereft of any use of the gun that was intended, in and of itself, to convey a message. Indeed, plaintiffs rely on legal conclusions that the possession of the gun is expressive conduct. Plaintiffs' Br. at 4. Attendees of the gun show are capable, however, of expressing their views regarding guns in a variety of ways, including through speeches, leafleting, and sales of expressive products without the possession of guns. Moreover, unlike in Nordyke, plaintiffs remained free to offer to sell and to sell guns, the one caveat being that those sales cannot be consummated (i.e. the gun cannot be handed over)

on Alameda County public property.[5]

In Texas v. Johnson, the Court explained that conduct is also protected as speech if there is "[a]n intent to convey a particularized message present, and [if] the likelihood is great that the message would be understood by those who viewed it." Texas v. Johnson, 491 U.S. at 404, citing U.S. v. O'Brien, 418 U.S. at 410-411. Such situations are imaginable in our case. Suppose anti-gun advocates were to stage a protest at the Fairgrounds in which they collected guns and dismantled them to express the idea that guns should be eliminated from society. The dismantling of the guns itself would be an expressive act supporting their ideas. They might even choose to burn guns to express their views as Johnson burned his flag. These seem like plausible ways in which possession of a gun could amount to expressive conduct. However, none are asserted here, what plaintiffs complain of is the ability to exhibit, buy and sell guns.

The Supreme Court has warned that there is a "limitless variety of conduct that can be 'speech' whenever the conduct intends thereby to express an idea." U.S. v. O'Brien, 391 U.S. at 376. The Court pays heed to this warning and finds its salient here. The plaintiffs' argument would stretch the scope of speech beyond its constitutional realm, and lacks a principal basis for distinction from the possession of any regulated commodity or object as a "statement" regarding the propriety of such regulation. Texas v. Johnson confines the concept of speech in the First Amendment meaning of [*7] the term to expressive conduct only insofar as the conduct itself communicates a message. That crucial predicate is absent from the mere fact of possessing a handgun.

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[5] The ordinance is consonant with California law, which in any event requires a ten-day waiting period and background check before most purchased weapons actually change hands. Cal.Penal Code § 12071(b)(3)(A).

Even unassuming *arguendo,* however, that the possession of a gun could be expressive conduct, "a sufficiently important government interest in regulating the nonspeech element can justify incidental limitations on [speech]." Id. Thus, even assuming plaintiffs can overcome the fundamental hurdle of establishing that possession of weapons implicate speech, the question would turn to whether the governmental interest in this ordinance justifies its limitation on speech.

2. The Governmental Interest

In U.S. v. O'Brien, the Court upheld a federal law prohibiting the destruction of selective service registration certificates. 391 U.S. at 386. The Court stated that a government regulation is constitutional even though it incidentally limits speech if: 1) it is within the constitutional power of the government, 2) it furthers an important or substantial government interest, 3) it is unrelated to the suppression of free expression, and 4) the incidental restriction on speech no greater than is essential to the furtherance of that interest. Defendants argue, convincingly, that the first two elements are met here.[6] The Alameda County ordinance was passed in the interest of public health and safety generally, and specifically in response to a July 1998 shooting at the very same Alameda County Fairgrounds. Promulgation of the ordinance is both within the constitutional powers of the County and in

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The first element, whether this is within the constitutional powers of the County, is dealt with more fully in the preemption context. Plaintiffs also argue that the second element is not met. They question whether the government interest is compelling when no gun-related incidents have occurred at gun shows in the past. Assuming the contention is true, the conclusion is still problematic because the government interest is in safety at the fairgrounds generally. Whether at the gun show or at the county fair, defendants have an interest in protecting the public from the misuse of guns on county property.

furtherance of an important government interest, i.e. the safety of its citizens in common areas.[7] In Spence v. Washington, the Supreme Court closely examined the adequacy of the asserted governmental interests. See Spence, 418 U.S. at 412-14. The Court ultimately found unconstitutionally vague a Washington state statute prohibiting the improper use of an American flag. See Spence, 418 U.S. 415. The first and most important interest to the Court was the prevention [*8] of a breach of the peace. Id. at 412. The ordinance here goes directly to a breach of the peace interest. In fact, public health and safety is arguably an even more fundamental interest than a breach of the peace.

The closer issues are elements three and four. Element three asks whether the ordinance is intended to suppress free speech. Element four inquires whether the restrictions on speech are greater than is necessary or, in other words, if the regulation is narrowly tailored.[8] Looking first at whether the ordinance is intended to suppress free speech, plaintiffs point to comments by one of the County Supervisors that she hoped to suppress the presence of gun advocates at the gun shows and that she hoped to send a message that the county does not promote guns. Complaint, ¶ 23, 24. This argument, as a basis

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The Court notes that the public safety concerns addressed by the ordinance are so central to the exercise of local authorities' police power that a triggering incident, such as the 1998 shooting, was not a necessary constitutional predicate to its enactment, but instead only strengthens the conclusion that such a measure furthers a substantial and important interest.

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In U.S. v. O'Brien, the Court described this element as requiring that the government employ the most precise and narrowest means to achieve their interest. Plaintiff cites Broadrick v. Oklahoma, 413 U.S. 601 (1973), in which the Court said that a regulation restricting the exercise of first amendment rights "must be narrowly drawn." Broadrick, 413 U.S. at 611-12. The two requirements are, for our purposes, the same.

for striking down the ordinance, fails for two reasons. First, on its face the ordinance seeks to protect health and welfare without regard to suppression of speech. Plaintiffs are not prevented from expressing their views through speeches or written materials or any other way they choose. The ordinance at most prohibits the presence of guns during sales and, as such, does not suppress the speech associated with the sales in any manner. The ordinance itself does nothing to prevent acts the supervisors allegedly found offensive. In Texas v. Johnson, the Court could not find a single government interest separate from the suppression of speech. 491 U.S. at 418. By banning flag burning, not for the purpose of fire prevention but for patriotic reasons, the state inevitably sought to ban the views expressed by flag burning. The government's interests were inextricably tied to the symbolic nature of the flag and the message expressed by burning it. Here, the prohibited conduct is readily severable from the exercise of speech regarding guns. In other words, this ordinance has a distinct public health and safety interest "unrelated to the suppression of expression." Id. at 407.

The second problem with the argument is that it asks the Court to strike down the statute based on an improper legislative purpose. In U.S. v. O'Brien, the Court rejected the precise line of argument where, as here, the ordinance itself passes constitutional muster. See U.S. v. O'Brien, 391 [*9] U.S. at 383. The Court explained that the Court "will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." Id. The Court called this a "fundamental principle of constitutional adjudication." Id. Plaintiffs have not presented any reason to set aside such a clear rule.[9]

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This attack on legislative motivation is ostensibly the basis for the plaintiffs' inclusion of the individual Alameda County Board members as defendants in this case.

The fourth element in the O'Brien test is whether the ordinance is narrowly tailored to its legislative purpose. On this point, plaintiffs have made no concrete suggestions as to how the legislative purpose behind the enactments could have been more precisely tailored, choosing instead to attack the ordinance itself as, at best, and acted legislative redundancy. While this type of analysis is not illuminating on the issue of tailoring, the Court notes that several potentially less onerous alternatives, such as requiring licensing or registration of weapons tom be possessed in public, are specifically preempted by state law. See infra.

The amount and scope of feasible alternatives do not matter, however, where the ordinance is not related to the suppression of free expression. Without that as a starting point, the need for tailoring disappears in any event. Thus, having weighed the O'Brien factors to the extent permitted by the parties' submissions, the Court concludes that the plaintiffs have not demonstrated any likelihood of showing that the ordinance would violate plaintiffs' constitutional right to engage in expressive conduct, even were speech implicated by the possession of weapons.

3. Time, Place and Manner Regulations

A separate basis for the ordinance, again assuming arguendo a predicate impact on speech, comes from Supreme Court jurisprudence allowing government restrictions of speech in time, place or manner. At most, the ordinance restricts the place and manner in which plaintiffs exercise their freedom of speech. The test applied for time, place, or manner restrictions is little different from the O'Brien test. See Texas v.Johnson, 491 U.S. at 406, citing Clark v. Community for Creative Non-Violence, 468 U.S. 288, 298 (1984). A key element in the time, place, or manner restrictions test is whether the government interest is unconnected to expression. Id. The analysis supra

demonstrates that the government interest served by this ordinance is not connected to the suppression of [*10] constitutionally protected speech.

Moreover, content-neutral regulation of speech in a public forum does not offend the First Amendment where the regulation serves a significant governmental interest. See Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640, 648-49 (1981). In Heffron, to the Court held that Minnesota could regulate the time, place, and manner in which a religious sect sold its literature and solicited donations at the State fair. Id. at 655. The Court concluded that a state fairgrounds was a different public forum than an open street. Id. at 651. The fairgrounds attracted great numbers of visitors where the flow of the crowd and demands of safety were much greater than in a public street. Id. Therefore, the governmental interest in regulation of the activities on the fairground was by nature more compelling. Id. at 652.

The ordinance here does not regulate the time of the sales of guns. It regulates the place and manner in which guns are sold. Guns can be bought and sold at the fair grounds but not with possession of the actual gun. Under Heffron, the government interest in this type of time, place, or manner regulation is by nature more compelling because it occurs at the fairgrounds. The regulation is permissible if it serves a significant governmental interest and it is content-neutral. The Courts' analysis supra shows how these two elements are met by the ordinance. The ordinance would thus also be valid, therefore, as a time, place, or manner restriction of free speech, even if the Court had discerned a predicate impact on constitutionally protected speech.

B. Commercial Speech

1. Does the Ordinance Implicate

Commercial Speech?

On the issue of commercial speech, plaintiffs' prior successful litigation in Santa Clara County is informative. The act of exchanging money for guns is not "speech" within the meaning of the First Amendment, but offers to buy and sell guns are. Nordyke v. Santa Clara County, 110 F.3d 707, 710 (9th Cir. 1997). In Nordyke, the Ninth Circuit struck down a Santa Clara County lease addendum that prohibited the offering for sale of firearms or ammunition at gun shows at the County Fairgrounds. Id. at 713. The court reasoned that the addendum unconstitutionally abridged the gun show attendees right to engage in the commercial speech required to buy and sell guns. The ordinance directly restricted speech by prohibiting offers to sell guns.

[*11] The initial Nordyke case has superficial similarities to our case. The plaintiffs make a similar claim. Plaintiffs argue that the ordinance here similarly restricts the commercial speech associated with buying and selling guns. A threshold question for this Court, as for the Ninth Circuit in Nordyke, is whether the regulation implicates commercial speech. See Id. at 710. In Nordyke, the County argued that the addendum did not implicate commercial speech because it prohibited only the act of selling guns. See id. The court agreed that the act of exchanging guns for money was not "'speech' within the meaning of the First Amendment." Id. The court explained, however, that the addendum did not merely prohibit the act of exchanging guns but it prohibited the "offering for sale of guns." Id. The court found this fact dispositive in concluding that the addendum implicated commercial speech. Once it found commercial speech implicated, the court applied the test from Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n. of N.Y., 447 U.S. 557 (1980), to determine if the addendum met the constitutional requirements for the regulation of commercial speech.

The ordinance here, however, is fundamentally different from the lease addendum at issue in Nordyke. The ordinance does not prohibit the speech associated with buying and selling guns. It prohibits the possession of guns, which at most prohibits the presence of guns during any sale on public property. The ordinance does not affect any part of the actual speech associated with the sale of guns at the gun show. It does not "purport to prohibit any person from the 'offering for sale...firearms.'" Id. Moreover, plaintiffs do not cite any authority concluding that the possession of guns is connected to the sale of the gun. The Court therefore finds the analogy of this case to Nordyke unpersuasive.

Commercial speech is speech that does no more than propose a commercial transaction. Regulations found to have abridged this right share the common element that they directly affect a part of the speech that proposes a commercial transaction. See Virginia State Bd. of Pharmacy, 425 U.S. at 748-750 (challenged regulation prohibited pharmacists from advertising prices up prescription drugs); Central Hudson Gas & Electric Corporation vs. Public Service Commission of New York, 447 U.S. 557, 558 (1980) (New York State law ordered utilities to stop advertising that promoted electricity use); 44 Liquormart v. Rhode Island, 517 U.S. 484, 489 (1996) (Rhode Island law [*12] prohibited advertising liquor prices). Here, plaintiffs are free to advertise the sale of guns and offer them for sale either verbally or on paper, and can actually buy and sell them, albeit without the guns' presence on County property. The ordinance does not overtly restrict commercial speech, that is, communications actually necessary to effectuate a sale, in the way found unconstitutional by the Supreme Court in the cases cited supra, and in the way both the District Court and the Ninth Circuit found to be crucial in Nordyke. Therefore, the court cannot find the plaintiffs' constitutional challenge to the ordinance enjoys a likelihood of success on its merits.

2. Is the Possession of Guns Inextricably Linked To Commercial Speech?

The sale of merchandise which either delivers or itself constitutes a political, religious, philosophical or ideological message is fully protected, noncommercial speech. See Gaudiya Vaishnava Society v. City and County of San Francisco, 952 F.2d 1059, 1066 (9th Cir. 1991). In Gaudiya, the Ninth Circuit struck down an ordinance that prohibited the sale the sale of T-shirts, books, buttons, and bumper stickers carrying political, philosophical and ideological messages. Id. The court reasoned that where the pure speech conveyed by the products is inextricably linked with the commercial speech necessary to the sale, the activity is classified as fully protected noncommercial speech. Plaintiffs argue that the sale of guns is an example of pure speech (i.e. the guns convey a message), inextricably linked with the commercial speech necessary for the sale. This analogy, however, is unavailing here.

Most notably, the analogy fails because the ordinance at issue does not prohibit the commercial transaction. In Gaudiya and Nordyke, the regulation at issue actually prohibited the verbal offer of sale. Here, plaintiffs are free to engage any desired speech, commercial, political or otherwise. The analysis in this case, therefore, never reaches the question of whether pure speech and commercial speech are inextricably intertwined. Admittedly, the transaction may be hindered slightly, and on occasion prevented, because the gun itself is absent during the transaction. Plaintiffs are not prevented, however, from making their transactions through the use of photographs, written descriptions, or even imitation firearms. However, there is absolutely no restriction of the message [*13] conveyed by the actual sale of the gun, as was the case in Gaudiya, since plaintiffs are free to buy and sell guns.

The assumption that the sale of a gun conveys a message

of the kind present in Gaudiya, furthermore, is unsupportable. In Gaudiya, the plaintiffs sold T-shirts with actual written messages on them. The court acknowledged that the T-shirts literally conveyed a message, and were not "expressive conduct regarding symbolic items, as ... in both O'Brien and Texas v. Johnson." Id. at 1065. This finding led the court ultimately to the conclusion that the pure speech on the T-shirts was linked to the commercial speech of the sale. The sale of guns in our case, by contrast, more closely resembles expressive conduct regarding symbolic items than expressive objects with written messages. The guns do not have a message printed on them. They are, at best, a symbolic item representing the idea of gun use. The nexus between the possession and commercial exchange of guns and the sale of message bearing T-shirts and bumper stickers with messages is too attenuated for Gaudiya to apply here. The Court concludes accordingly that the ordinance does not impermissibly impact protected commercial speech, either directly or indirectly.

IV. State Preemption

Plaintiffs' second line of argument is that state law preempts the ability of local governments to intrude into the field of weapons regulation. For reasons outlined below, the Court finds that the field of weapons legislation has not been completely preempted by state law, and that the Ordinance seeks to regulate the possession of weapons on public property, a matter not preempted by any law of general application in California.

An initial point is that the Second Amendment, unlike most other provisions of the Bill of Rights, has never been incorporated against the states. In the absence of incorporation, the Second Amendment constraints federal action, and not state action. Presser v. Illinois, 116 U.S. 252 (1886). Therefore, the substantive protections afforded by the Second Amendment are

not relevant to the Court's review of state law, such as the ordinance at issue here. While plaintiffs do not assert a second amendment right to bear arms, they could not, for individuals lack standing to assert Second amendment claims. In Hickman v. Block, 81 F.3d 98, 100-01 (9th Cir. 1996), *cert. denied,* 519 U.S. 912 (1996), the Ninth Circuit stated that "no individual has ever succeeded in demonstrating such [*14] injury in federal court." Id. at 101. The court explained that "because the Second Amendment guarantees the right of the states to maintain armed militia, the states alone stand in the position to show legal injury when this right is infringed." Id. at 102. Therefore, under current law, only states are proper Second Amendment plaintiffs, and only federal authorities are proper Second Amendment defendants.

Given the nonavailability of Second Amendment protections to plaintiffs, the baseline considerations for preemption are as follows. Under Article XI, section 7 of the state Constitution, a county "they may make and enforce within its limits all local, police, sanitary and other ordinances and regulations not in conflict with general law." Under the police power granted by article XI, section 7, "counties and cities have plenary authority to govern, subject only to the limitation that they exercise this power within their territorial limits and subordinate to state law." Otherwise, the county's police power " is as broad as the police power exercisable by the Legislature itself." Birkenfeld v. City of Berkeley, 17 Cal. 3d 129, 140 (1976).

Therefore, the proper starting point in the Court's analysis is to assume that the county also has the constitutional police power, and the pertinent inquiry just becomes whether the Legislature has taken away the County's power to regulate weapons in the manner provided by the Ordinance. See California Rifle & Pistol Ass'n v. City of West Hollywood, 66 Cal.App.4th 1302, 1310 (1998).

The Court's preemption inquiry begins with the basic rule of preemption: if otherwise valid local legislation conflicts with state law, it is preempted and therefore void. Candid Enterprises v. Grossmont Untion High School Dist., 39 Cal.3d 878, 885 (1985). A preemptive conflict exists where the local legislation "duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication." Candid Enterprises, 39 Cal. 3d at 885. Of the express basis for preemption, duplication occurs where the local legislation is coextensive with pre-existing general law. In Re Portnoy, 21 Cal.2d 237, 240 (1942). Contradiction of general law is present where the local ordinance is inimical to the statewide regulation. Ex parte Daniels, 183 Cal. 3d 636, 641-648. "Full occupation" of a legislative area occurs only where the Legislature has expressly manifested an intent to fully occupy the area. Candid Enterprises, 39 Cal. 3d at 886.

Implied preemption arises when any of the three indicia of intent are present: (1) the subject [*15] matter has been so fully and completely covered by general law that it has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the benefit to the locality. Sherwin-Williams Co. v. City of Los Angeles, 4 Cal. 4th 893, 898, citing In re Hubbard, 62 Cal. 2d 119, 128 (1964).

Plaintiffs maintain that the ordinance banning the possession of firearms on Alameda County property is preempted, pointing to two sources for that argument. One source is Government Code 53071, which provides that "it is the intention of the Legislature to occupy the whole field of

regulation of the registration and licensing of firearms of commercially manufactured firearms". The second source is the First Appellate District's opinion in Doe v. City of County of San Francisco, 136 Cal. App. 3d 509 (1982). However, the Court's analysis below demonstrates, neither source can bear the broad preemptive weight plaintiffs urge. Instead, a survey of statutory and case law makes clear that the ordinance does not tread on preempted turf.

The language cited above from Government Code section 53071 is but one of three statutes implicated in examining plaintiffs' preemption claim. In California Rifle & Pistol, the California Court of Appeals examined Government Code sections 53071 and 53071.5, as well as Penal Code section 12026 (b), the precise provisions relied upon by the defendants here in arguing against preemption. The court there concluded that a West Hollywood city ordinance prohibiting the sale of "Saturday Night Special" handguns was neither expressly nor impliedly preempted. The Court relies on the exhaustive analysis undertaken by the California Rifle & Pistol court to illuminate the parameters of the preemption analysis here. First, California Rifle & Pistol reviewed the language of the two Government Code provisions and found that the language of each evidenced, respectively, a clear statement of preemption in the field of "registration or licensing of firearms" (Gov't Code 53071) and an intent to occupy "the whole field of regulation of manufacture, sale, or possession of imitation firearms" (Gov't Code 53071.5). 66 Cal. App. 4th at 1311-1312. Regarding Penal Code section 12026, a provision curtailing local government action in the field a firearm regulation, the court [*16] found that the fact that the Legislature had limited the coverage of this statute to permits of licenses for possessing a weapon at home, in a place of business or on private property demonstrates a legislative intent not to preempt local authorities

from acting in other areas of firearms regulation.[10] Id.

The California Rifle & Pistol court concluded that no preemption occurred as a result of these statutes; instead, judicial treatment of the issue and subsequent legislative action made clear to that court and to this Court, that the opposite conclusion was warranted. "The statutes, the judicial rulings interpreting the statutes, and the legislative responses to the judicial rulings demonstrate that the Legislature has carefully avoided a blanket preemption in the field of firearms regulation. Although the Legislature has declared in express intent to "occupy the field" with regard to limited subfields of the universe of firearms regulation, the Legislature has carefully refrained from manifesting any intent to eliminate the City's authority to enact the specific type of ordinance at issue here." Id. at 1311.

Plaintiffs also rely heavily on Doe v. City and County of San Francisco, 136 Cal. App. 3d 509 (1982), in support of their preemption argument. However, once the legal landscape is properly drawn, it is clear that Doe addressed a statute implicating one of the three explicit declarations of preemption listed above, namely, the Penal Code's ban on regulation of possession of firearms in private residences. The San Francisco ordinance in question sought to ban all firearms from the city, and made no distinctions between public and private possession and/or use of the weapons. On that latter point, the Court of Appeals found that the ordinance ran afoul of the Penal Code's express preemption of local action banning any permit or licensing structure for guns "within the citizen's or legal resident's place of residence, place of business, or on private

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Moreover, Penal Code section 12026(b)'s parallel use of the terms "license" and "possess" undermines plaintiffs' proposed construction that would have Government Code 53071's use of the term "registration or licensing" encompass possession.

property owned or lawfully possessed by the legal resident." Cal. Penal Code 12026(b). Thus, as defendants correctly point out, Doe hinges on an explicit, tailored preemption an statutory law, and not on an inferential reading that the term "regulation or licensing" of firearms as used in the Government Code also encompasses possession. Doe is thus but one of several cases construing state regulation of firearms [*17] narrowly. See, e.g., Suter v. City of Lafayette, 57 Cal. App. 4th 1109, 1119 n.2 (1997) (rejecting broad construction of preemption argument based on "registration and licensing" language in Gov't Code 53071, and citing Galvan v. Superior Court, 70 Cal.2d 851 (1969) and Olsen v. McGillicuddy, 15 Cal. App. 3d 897 (1971) in support of this reading). Simply put, the Court's survey of California law makes it clear that the broad preemption argued for by plaintiffs has not occurred.

The Court must also address the preemption question in light of the recently enacted amendments to the Penal Code, which do not take effect until next year. A.B. 295, also known in part as the Gun Show Enforcement and Security Act of 2000, amends section 12071.1 of the Penal Code provide the licensing procedures for gun show promoters in the state. The amendments require a certification of eligibility, issued by the Department of Justice and renewable annually, for any person wishing to promote or hold gun shows, and provides penalties for failure to comply with notice or security requirements. The second major component of A.B. 295 will be, when effective, a new section 12071.4 of the Penal Code. That new section places burdens on gun show vendors, including mandatory compliance certifications, the separation of displayed weapons from ammunition, and

Having reviewed the recent amendments to the Penal Code carefully, the Court concludes that the latest legislation is consistent with the view that there is no preemption of local law regarding the possession of firearms. The new and amended

statutory provisions clearly govern "registration or licensing" of firearms, which in itself grants the provision preemptive effect, but gives no explicit indication that it now seeks to fully occupy other, new subfields of weapons regulation. Indeed, the plain language of the statute logically forecloses any such finding: new section 12071.4 requires gun show vendors to certify compliance with, inter alia, "local laws dealing with the possession and transfer" of firearms. This explicit provision contradicts the suggestion that, by this very statute, the field of possession of firearms has been preempted. Instead, it underscores the conclusion drawn by several California courts, most recently California Rifle & Pistol: the Legislature regards the regulation of possession of firearms as a local concern.

Finally, plaintiffs have called the Court's attention to a recent decision issued by Judge Paez of the Central District of California, finding that a Los Angeles County ordinance was preempted by [*18] state law. Order Granting Preliminary Injunction and Denying Stay Pending Appeal, Great Western Shows Inc, v. County of Los Angeles, Case No. CV 999661 RAP (C.D. Cal., Oct. 21, 1999). At issue in Great Western was an ordinance regulating the sale of firearms and ammunition on County property. Specifically, the statutory provision at issue was that "the sale of firearms and/or ammunition on County property is prohibited." L.A. County Code § 13.67.030. "Sale" as used in the ordinance was defined to include the act of placing an order for a weapon or ammunition. The Los Angeles County ordinance makes no attempt to regulate the possession of firearms or ammunition on public property. The District Court found a conflict between the ordinance and section 12071(b)(1)(B) of the Penal Code, which entitles licensed dealers to conduct business, including sales, at gun shows. The court initially recognized, following Suter, that the field of firearms regulation is not occupied by state law, save in certain delineated areas, such as sales at gun shows. The court found that, given the statutory language contained in section

12071(b)(1)(B) expressly allowing sales of guns and gun shows, the local authorities' power to regulate or prohibit sales or offers to sell or purchase was preempted under state law.

It could easily be argued that Great Western is inconsistent with Suter and California Rifle & Pistol, decisions wherein state courts of appeal rejected the preemption arguments plaintiffs make here and approved local regulations curtailing the sale of firearms. In California Rifle & Pistol, the appellate court upheld the city regulation prohibiting the sale of "Saturday Night Specials", and in Suter, the court upheld an ordinance requiring land-use permits as a condition precedent to the sale of firearms. In each case, the court clearly held that with respect to local regulation of firearms, whereas the Legislature has expressed an intent to occupy the field with regard to limited subfields of the universe of firearms regulation, the Legislature has carefully refrained from manifesting any intent to eliminate local authorities' power to enact the specific type of ordnance at issue. As such, these decisions stand for the proposition that local government has, pursuant to the state Constitution, authority to regulate the sale of firearms as a proper exercise of its police power.

However, the Court need not quarrel with Great Western's conclusion that the sales of firearms are regulated exclusively by state law, because the analysis of the ordinance at issue in Great Western fails to undermine the strength of the analysis undertaken above. First, as discussed in [*19] Suter and California Rifle & Pistol, the Legislature has clearly manifested its intention to divest localities of their constitutional prerogative to enact legislation in the area of firearms regulation in a tailored, rather than broad, fashion. Second, where express preemption has been found, the state courts have required clear and unambiguous language supporting a finding of preemption or a clear legislative intent to occupy the particular subfields of regulation at issue. Penal

Code section 12071, which is specifically relied upon in Great Western, does not contain any language that addresses the specific subject matter regulated by the ordinance at issue here, i.e. the possession of firearms. Simply put, Great Western rests on a simple premise: licensed gun show vendors are permitted by state law to sell guns at gun shows. This premise does not, however, command the second, different premise that gun show vendors or patrons are permitted to possess guns at shows, or in any other context on public property. The structure of applicable state law, including the Penal Code provisions cited here and in Great Western, not only fail to suggest this extension, but affirmatively foreclose it as a matter of preemption.

Given the Court's conclusion that no explicit preemption of the Ordinance has occurred, the court must turn to the question of implied preemption. The Court's analysis of the Sherwin-Williams indicia yields the clear conclusion that no implied preemption is proper, either. Here again, the Court notes the thorough treatment of this precise issue in California Rifle & Pistol. Of initial note is that the application of implied preemption is to be approached with some caution. "Since preemption depends upon legislative intent, such a situation necessarily begs the question of why, if preemption was legislatively intended, the Legislature did not simply say so, as the Legislature has done many times in many circumstances." California Rifle & Pisol, 66 Cal. App. 4th 1302, 1317 (1998). Hence, the Court must find that the factors evince that the Legislature "clearly indicate" an intention to preempt. Sherwin-Williams, 4 Cal. 4th at 898.

The first Sherwin-William indicator is whether the subject matter is so fully and completely occupied by general law that it has become exclusively a matter of state concern. This is clearly not the case here, as the California Rifle & Pistol court found, for two reasons. The first, discussed above, is that

the Legislature has clearly been sparing and tailored in its arrogation of exclusive legislative authority, and perhaps even more telling, has remained consistently so in light of judicial [*20] findings of narrow preemption. As Suter held, "the Legislature's response to cases upholding local weapons legislation against a preemption challenge itself is persuasive evidence that it has no intention of preempting areas of weapons laws not specifically addressed by state statute." 57 Cal. App. 4th at 1119. Second, the area of gun regulation is particularly a matter of local concern, as the Galvan court found. "That problems with firearms are likely to require different treatment in San Francisco County that in Mono County should require no elaborate citation of authority." 70 Cal. 2d at 864. So, too, with Alameda County; the Court thus finds that the first Sherwin-Williams indicator does not favor implied preemption.

The second indicator is whether the subject matter is partially covered by state law, worded to "indicate clearly" that no further or additional local action is permissible. 4 Cal. 4th at 898. This inquiry yields no more promising an outcome for plaintiffs. "To the contrary, the Legislature's successive enactments have all been carefully worded not to preclude local action on related topics. Moreover, the Legislature has expressly acknowledged the continuing police power of municipalities to regulate the sale of firearms." California Rifle & Pistol, 66 Cal. App 4th at 1319, citing Suter, 57 Cal. App. 4th at 1120-1121.

The third Sherwin-Williams indicator focuses the Court on whether the subject matter is partially covered by state law and the adverse effects on a local ordinance on transient citizens outweigh the possible benefit to the locality. Again, the state courts of appeals have spoken persuasively on this issue. "Laws designed to control the sale, use or possession of firearms in a particular community has very little impact on transient

citizens, indeed, far less than other laws that have withstood preemption challenges." Suter, 57 Cal. App. 4th at 1119. In sum, the Court finds no basis for concluding that preemption of the ordinance should be implied, and in fact finds ample and unequivocal support for the opposite conclusion.[11]

CONCLUSION

For the reasons outlined above, the Court finds no basis for ascertaining a fair likelihood of success on the merits of plaintiffs' First Amendment challenge as to the Alameda County ordinance prohibiting the possession of firearms on public property. Nor have plaintiffs established a likelihood of success in demonstrating that the field of regulation of firearms possession been preempted by the Legislature. Without at least a fair likelihood of success on the merits, plaintiffs' showing must fail under either of the Ninth Circuit's alternative standards for issuance of a temporary restraining order or preliminary injunction.[12] Accordingly, plaintiffs' motion for

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Great Western makes no mention of the distinction between explicit and implied preemption, nor does it deal with the Sherwin-Williams factors. However, the Court finds that Great Western does not offer safe harbor for plaintiffs' implied preemption the arguments either, since it sheds no additional perspective on any of the three indicia, let alone any clear indication that any of the three are present.

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For this reason, the Court need not reach the question of balance of hardships. The Court notes, however, that plaintiffs have asserted that the proposed ordinance's effect will be chilling on attendance at the fairs, for patrons and vendors alike. The County has submitted evidence of several civil claims against it arising from the July 1998 Fairgrounds shootings, the implication being that a failure to ban the possession of firearms on public property will leave the County's coffers vulnerable to future premises liability suits from gun victims. While the Court finds plaintiffs' allegation of harm to be more concrete and direct on this record, that conclusion cannot save plaintiffs' showing, due to the absence of a likelihood of success on the merits.

temporary restraining order and for preliminary injunction is DENIED.

IT IS SO ORDERED.

Dated: 11/3/99 /s/

MARTIN J. JENKINS
UNITED STATES DISTRICT JUDGE

ORDER CERTIFYING QUESTIONS TO THE CALIFORNIA SUPREME COURT FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Filed: September 12, 2000

JUDGES:
Before: Arthur L. Alarcon, Diarmuid F. O'Scannlain, and Ronald M. Gould, Circuit Judges.

OPINION BY:
DIARMUID F. O'SCANNLAIN

OPINION:

ORDER CERTIFYING QUESTION TO THE CALIFORNIA SUPREME COURT

We certify to the California Supreme Court the question set forth in Part III of this order.

All further proceedings in this case are stayed pending receipt of the answer to the certified question. This case is withdrawn from submission until further order of this court. If the California Supreme Court accepts the certified question for answer, the parties shall file a joint report six months after date of acceptance and every six months thereafter advising us of the status of the proceedings. This case is being certified jointly with Great Western Shows, Inc. v. Los Angeles, 229 F.3d 1258, 2000 U.S. App. LEXIS 22898, which raises a closely related issue of preemption.

I

Pursuant to Rule 29.5 of the California Rules of Court, a panel of the United States Court of Appeals for the Ninth Circuit, before which this appeal is pending, certifies to the

California Supreme Court a question of law concerning the possible state preemption of local gun control ordinances. The decisions of the Courts of Appeal of the State of California provide no controlling precedent regarding the certified question, the answer to which may be determinative of this appeal. We respectfully request that the California Supreme Court answer the certified questions presented below. Our phrasing of the issue is not meant to restrict the court's consideration of the case. We agree to follow the answer provided by the California Supreme Court. If the Supreme Court declines certification, we will resolve the issue according to our perception of California law.

II

Nordyke, et al., are deemed the petitioners in this request because they are appealing the district court's ruling on this issue. The caption of the case is:

RUSSELL ALLEN NORDYKE; ANN SALLIE NORDYKE, dba TS Trade Shows; JESS B. GUY; DUANE DARR; WILLIAM J. JONES; DARYL DAVID; TASIANA WERTYSCHYN; JEAN LEE, TODD BALTES; DENNIS BLAIR; R.A. ADAMS; ROGER BAKER; MIKE FOURNIER; VIRGIL McVICKER,

Plaintiffs - Appellants,

v.

MARY V. KING; GAIL STEELE; WILMA CHAN; KEITH CARSON; SCOTT HAGGERTY, COUNTY OF ALAMEDA; THE COUNTY OF ALAMEDA BOARD OF SUPERVISORS,

Defendants - Appellees.

Counsel for the parties are as follows:

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III

The question of law to be answered is:

1. Does state law regulating the possession of firearms and gun shows preempt a municipal ordinance prohibiting gun possession on county property?

IV

The statement of facts is as follows:

Russell Nordyke and Sallie Nordyke (dba TS Trade Shows) ("Nordyke") have been promoting gun shows at the Alameda County Fairgrounds ("Fairgrounds") since 1991. The Fairgrounds are located on unincorporated county land in the City of Pleasanton.[1] The exhibitors at the show include sellers of antique (pre-1898) firearms, modern firearms, ammunition, Old West memorabilia, and outdoor clothing. In addition, the show hosts educational workshops, issue groups and political organizations. The remaining plaintiffs are exhibitors and patrons of the show.

In August 1999, Alameda County ("County") passed an ordinance making illegal the possession of firearms on County

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[1]Thus, the jurisdictional issue raised in Great Western Shows, Inc. v. Los Angeles County is not present in this case.

property ("Ordinance"). The Ordinance would forbid the presence of firearms at gun shows, such as Nordyke's, held at the Fairgrounds. Practically, the Ordinance makes it unlikely that a gun show could profitably be held there.

To prevent the Ordinance's enforcement, Nordyke brought suit against the County in the United States District Court for the Northern District of California. Nordyke applied for a temporary restraining order, claiming that the Ordinance was preempted by state gun regulations and that it violated the First Amendment's free speech guarantee. The district court judge treated the application as one for a preliminary injunction and denied it. The judge noted that under either test for a preliminary injunction, a litigant must at least show a fair chance of success on the merits and ruled that Nordyke had failed to do so. Because he concluded that Nordyke had little chance of success on the merits, he did not reach the balance of the hardships determination.

Nordyke then filed an interlocutory appeal in the United States Court of Appeals for the Ninth Circuit.

V

We respectfully submit that the question needs certification for the following reasons:

"A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." Cal. Const. art XI, § 7 (emphasis added). A local law that conflicts with state law is invalid. See Sherwin-Williams Co. v. City of Los Angeles, 4 Cal. 4th 893, 897, 844 P.2d 534 (1993). "A conflict exists if the local legislation duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication." Id. (quotations and citations omitted). The district court concluded that the County did not legislate in an area the state had expressly or impliedly preempted. California law

offers no clear guidance concerning the possible preemption of the Alameda Ordinance.

In pertinent part, the Ordinance reads: "Every person who brings onto or possesses on County property a firearm, loaded or unloaded, or ammunition for a firearm is guilty of a misdemeanor." Alameda County Code § 9.12.120(b). Although not explicit in the Ordinance, the law effectively hinders Nordyke's efforts to hold gun shows at the Fairgrounds. In an effort to ward off application of the Ordinance, Nordyke argues first that the state has preempted the field of firearm possession. Second, he contends that, at least by implication, state regulation of gun shows, which provides for the possession of weapons, precludes local prohibitions of firearms at these shows.

Section 12071 of the Penal Code regulates the sales of firearms in California, expressly providing for the possession of firearms at gun shows. It reads in relevant part: "A person licensed pursuant to subdivision (a) may take possession of firearms and commence preparation of registers for the sale, delivery, or transfer of firearms at gun shows or events . . . . A person conducting business pursuant to this subparagraph shall be entitled to conduct business as authorized herein at any gun show or event in the state without regard to the jurisdiction within this state that issued the license . . . provided the person complies with . . . (ii) all applicable local laws, regulations, and fees, if any." Cal. Penal Code § 12071(b)(1)(B). In addition, California Penal Code § 12071.1 regulates gun shows throughout the state. Finally, the state legislature enacted a series of gun show regulations effective January 1, 2000. See Cal. Penal Code § § 12071.1; 12071.4. These laws clearly pertain to the possession of firearms at gun shows. From these provisions, one could well conclude that, as the state allows for the presence of and regulates the possession of firearms, a local government may not forbid it. On the other hand, the proviso allowing for local regulation may mean that municipal prohibitions are not preempted.

The Courts of Appeal of the State of California have responded in seemingly conflicting ways to this type of argument in the area of local gun regulation preemption. The argument finds most support in Doe v. City & County of San Francisco, 136 Cal. App. 3d 509, 186 Cal. Rptr. 380 (1982). In that case, the court inferred from the legislature's restriction on local handgun permit requirements an intent to foreclose local laws banning possession citywide. Id. at 518. "A restriction on requiring permits and licenses necessarily implies that possession is lawful without a permit or a license. It strains reason to suggest that the state Legislature would prohibit licenses and permits but allow a ban on possession." Id.; see also Northern California Psychiatric Society v. City of Berkeley, 178 Cal. App. 3d 90, 223 Cal. Rptr. 609 (1986) (holding that a city ordinance prohibiting the use of electroshock therapy throughout the city was preempted by state regulations evincing a clear intent to allow it). Moreover, an Attorney General opinion regarding the preemption of local ammunition sale bans adopts the same reasoning, relying explicitly on Doe. See Attorney General's Opinion No. 94-212 (July 7, 1994). In that Opinion, the Attorney General relied on the fact that the state banned ammunition over a certain caliber to conclude that a city could not ban smaller-caliber ammunition. Likewise, the state legislature's having expressly provided for the presence of firearms at gun shows may imply that local ordinances, like that of Los Angeles, banning the possession of such weapons are preempted.

More recently, however, in California Rifle and Pistol Ass'n, Inc. v. City of West Hollywood, 66 Cal. App. 4th 1302 (1998), the Court of Appeal for the Second Appellate District of California appears to have disavowed the logic underlying the district court's conclusion and the pertinent part of Doe. In California Rifle, the court confronted a challenge, on preemption grounds, to a city ban on sales of certain handguns known as Saturday Night Specials. Id. at 1306-07. The court expressly considered an argument analogous to the one Nordyke

makes here - that because state law envisions possession at gun shows, the County cannot foreclose possession at gun shows. There, the court confronted the argument that because under state law sales of firearms are regulated, but legal, a city cannot ban the sale of certain types of firearms. See id. at 1323. The court rejected this reasoning as tautological: "Again, it is no doubt tautologically true that something that is not prohibited by state law is lawful under state law, but the question here is whether the Legislature intended to strip local governments of their constitutional power to ban the local sale of firearms which the local governments believe are causing a particular problem within their borders." Id. at 1324. This reasoning appears to be at tension with the reasoning of Doe.

Furthermore, the court's discussion of preemption in California Rifle suggests that the Ordinance may very well not be preempted. First, the court held that the California legislature has not expressly preempted local regulation of handgun sales. See id. at 1311-17. Next, the court examined whether, as the district court concluded here, the local law was impliedly preempted. "Implied preemption can properly be found only when the circumstances 'clearly indicate' a legislative intent to preempt." Id. at 1317 (quoting Sherwin-Williams, 4 Cal. 4th at 898).

When the Legislature has passed laws to overturn a court's decision that a local government's laws are not preempted, it has tailored them narrowly, refusing at every turn to preempt the entire field of gun control. This history demonstrates "a legislative intent to permit local governments to continue to apply their police power according to the particular needs of the community." California Rifle, 66 Cal. App. 4th at 1318; see also Suter v. City of Lafayette, 57 Cal. App. 4th 1109, 1119 (1997). The careful wording of the legislature's response may indicate that it does not wish to preclude local actions in areas where it has not expressly preempted. See California Rifle, 66 Cal. App. 4th at 1319-20 (discussing Suter, 57 Cal. App. 4th at

1120-21). Finally, the Courts of Appeal of the State of California appear to have foreclosed an argument for gun sale preemption based on the assertion that the adverse affects of a local law on transient citizens outweigh the benefit to the municipality. See California Rifle, 66 Cal. App. 4th at 1320-21.

The California cases teach that when examining the preemption issue in the field of gun control, courts are to look narrowly at the specific conduct at issue - here, the sale of guns on County property. The Ordinance here does not ban possession at all gun shows held in the County, it bans possession on County property only. This may distinguish it from the Ordinance held impliedly preempted in Doe. See 136 Cal. App. 3d at 518. While the Ordinance may have the practical effect foreclosing shows Nordyke has traditionally held at the County Fairgrounds, it does not speak at all to gun shows held on any non-County property in the county. But the question we face is whether the extensive state regulation of gun shows, all of which foresees the sale of firearms, precludes even such action. Also uncertain is whether the state law provisions requiring gun shows to comply with all local regulations allow municipalities to completely prohibit possession at these shows, an action that may have the practical effect of shutting them down.

In sum, there is tension in the reasoning underlying several decisions of the Courts of Appeal of the State of California and an Opinion of its Attorney General. In addition, no California court, to our knowledge, has yet confronted the possible preemptive impact of the new gun show regulations that went into effect January 1, 2000. We are mindful of the considerations of comity when we are being asked to invalidate, on federal constitutional grounds, a local California law. Resolution of the state law issue may obviate the need to decide the federal constitutional question. The area of gun control regulation is a sensitive area of local concern with which we hesitate to interfere, particularly where we are asked to

determine unclear questions of state law. A clear statement by the California Supreme Court would provide guidance to local governments with respect to the powers they may exercise in passing local gun control regulations.

VI

The Clerk of Court is hereby directed to transmit forthwith to the California Supreme Court, under official seal of the Ninth Circuit, a copy of this order and request for certification and all relevant briefs and excerpts of record pursuant to California Rule of Court 29.5(c).

IT IS SO ORDERED.

DIARMUID F. O'SCANNLAIN

U.S. Circuit Judge for the Ninth Circuit

CALIFORNIA SUPREME COURT'S ANSWER TO CERTIFIED QUESTION

Filed: April 22, 2002

JUDGES: MORENO, J. WE CONCUR: GEORGE, C. J., KENNARD, J., BAXTER, J., WERDEGAR, J., CHIN, J. DISSENTING OPINION BY BROWN, J.

OPINION BY: MORENO

OPINION:

We granted the request of the United States Court of Appeals for the Ninth Circuit, for certification pursuant to California Rules of Court, rule 29.5 to address the following question: Does state law regulating the possession of firearms and gun shows preempt a municipal ordinance prohibiting gun possession on county property? We conclude that the municipal ordinance in question, insofar as it concerns gun shows, is not preempted. Other aspects of the ordinance may be partially preempted, but we need not address these aspects in this case.

I. STATEMENT OF FACTS

The facts, as set forth by the Ninth Circuit and from our own review of the record, are as follows:

Plaintiffs Russell Nordyke and Sallie Nordyke (doing business as TS Trade Shows) (the Nordykes) have been promoting gun shows at the Alameda County Fairgrounds (Fairgrounds) since 1991. The Fairgrounds are located on unincorporated county land in the City of Pleasanton and are managed by an independent nonprofit corporation, the Alameda County Fair Association (Fair Association), under an operating agreement with Alameda County. The exhibitors at the show include sellers of antique (pre-1898) firearms, modern firearms, ammunition, Old West memorabilia, and outdoor clothing. In

addition, the show hosts educational workshops, issue groups, and political organizations. The remaining plaintiffs are exhibitors and patrons of the show.

Alameda County passed in August 1999 and amended in September 1999 an ordinance (Ordinance) making it a misdemeanor to "bring[] onto or possess[] on County property a firearm, loaded or unloaded, or ammunition for a firearm . . . ." (Alameda County, Gen. Ord. Code, ch. 9.12, § 9.12.120, subd. B.) The Ordinance recited as justification the epidemic of gunshot fatalities or injuries in the county in the first five years of the 1990s, 879 homicides were committed using firearms and 1,647 additional victims were hospitalized with gunshot injuries. The Ordinance also recited a July 4, 1998, shooting incident on the Fairgrounds resulting in several gunshot wounds and other injuries.

The Ordinance was subject to certain limitations and exceptions. County property did not include any " 'local public building' " as defined in Penal Code section 171b, subdivision c. (Alameda County Gen. Ord. Code, ch. 9.12, § 9.12.120, subd. C.) It exempted from the prohibition various classes of persons, including peace officers, various types of security guards, persons holding valid firearm's licenses pursuant to Penal Code section 12050, and authorized participants "in a motion picture, television, video, dance, or theatrical production or event" under certain circumstances. (Alameda County Gen. Ord. Code, ch. 9.12, § 9.12.120, subd. F.) The Ordinance would have, as one of its chief consequences, the effect of forbidding the presence of firearms at gun shows, such as the Nordykes', thereby making such shows impractical.

To prevent the Ordinance's enforcement, the Nordykes brought suit against Alameda County in the United States District Court for the Northern District of California. The Nordykes applied for a temporary restraining order, claiming that the ordinance was preempted by state gun regulations and that it violated the First Amendment's free speech guarantee.

The district court judge treated the application as one for a preliminary injunction and denied it, finding that the Nordykes had failed to demonstrate probable success on the merits.

The Nordykes then filed an interlocutory appeal in the United States Court of Appeals for the Ninth Circuit, which subsequently certified to us the above question. We granted certification for reasons similar to those stated in the companion case also decided today, Great Western Shows, Inc. v. County of Los Angeles (April 22, 2002, S091547) 2002 Cal. LEXIS 2350, __ Cal.4th __ (Great Western).

II. DISCUSSION

General preemption principles are recapitulated in Great Western, a case addressing whether state law preempts an ordinance banning the sale of guns on county property. We conclude in Great Western that "[a] review of the gun law preemption cases indicates that the Legislature has preempted discrete areas of gun regulation rather than the entire field of gun control." (Great Western, supra, 2002 Cal. LEXIS 2350, ___ Cal.4th at p. ___ [p. 5].) We further conclude that an ordinance banning the sale of firearms and ammunition on county property, specifically targeted at the gun show held at the Los Angeles County Fairgrounds, is not preempted by state law: it is not expressly preempted by the statutes regulating gun shows, it does not duplicate or contradict such statutes, nor is the manifest legislative intent of these statutes to occupy the field of gun show regulation. With regard to this last point, Great Western applied the traditional three-part test, asking whether " '(1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general

law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the' locality." (Sherwin-Williams Co. v. City of Los Angeles (1993) 4 Cal.4th 893, 898, 844 P.2d 534.)

Applying the above test, we conclude in Great Western (1) that gun show statutes do not clearly indicate that gun show regulation has become exclusively a matter of state concern, but are rather expressly made subject to applicable local laws; (2) that there are significant local interests in gun regulation that the Legislature has not sought to override except in specific areas; and (3) that the ordinance in question did not have substantial impact on transient citizens. (Great Western, supra, 2002 Cal. LEXIS 2350 ___ Cal.4th at pp. ___ [pp. 14-16].)

We further concluded that under Government Code section 23004, subdivision (d), a county is given substantial authority to manage its property, including the most fundamental decision as to how the property will be used, and that nothing in the gun show statutes evince an intent to override that authority. The gun show statutes do not "mandate that counties use their property for such shows. If the County does allow such shows, it may impose more stringent restrictions on the sale of firearms than state law prescribes." (Great Western, supra, 2002 Cal. LEXIS 2350, 27 Cal. 4th at p. 870.)

In the present case, the effect on the Nordykes of the Ordinance banning guns on county property is to make gun shows on such property virtually impossible. But as we held in Great Western, such a total ban is within the scope of a county's authority. Nor do the Nordykes contend that the county violated its operating agreement with the Fair Association by enacting the Ordinance.

The Nordykes claim that a number of state statutes that govern the possession of firearms are duplicated or contradicted by the Ordinance. Penal Code section 12025 prohibits possession of concealable firearms, subject to various exceptions. Penal Code section 12031 prohibits the carrying of

loaded firearms, again subject to certain exceptions. These statutes criminalize the possession of a concealed and loaded firearm respectively, subject to licensing requirements found in Penal Code sections 12050 and 12051. Thus the state statutes, read together, make it a crime to possess concealed or loaded firearms without the proper license. The Ordinance makes it a misdemeanor to "bring[] onto or possess[] on County property a firearm, loaded or unloaded, or ammunition for a firearm . . . ." (Alameda County Gen. Ord. Code, ch. 9.12, § 9.12.120, subd. B.) The Ordinance does not duplicate the statutory scheme. Rather, it criminalizes possession of a firearm on county property, whether concealed, loaded or not, and whether the individual is licensed or not. Thus, the Ordinance does not criminalize " 'precisely the same acts which are . . . prohibited' " by statute (Pipoly v. Benson (1942) 20 Cal.2d 366, 370, 125 P.2d 482) and is therefore not duplicative. (Cf. Cohen v. Board of Supervisors (1985) 40 Cal.3d 277, 292, 219 Cal. Rptr. 467, 707 P.2d 840 [discrete portions of ordinance criminalizing exactly the same conduct as statute duplicative of and preempted by state law].) Put another way, possessing a gun on county property is not identical to the crime of possessing an unlicensed firearm that is concealable or loaded, nor is it a lesser included offense, and therefore someone may lawfully be convicted of both offenses. (See People v. Ortega (1998) 19 Cal.4th 686, 692, 968 P.2d 48.)[1]

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[1] The dissent contends that Penal Code sections 12031, 12050, and 12051 conflict with the Ordinance, apparently based on the presumption that these and other state statutes preempt the field of gun possession to such an extent that they impliedly prohibit counties from regulating gun possession on their own property. As explained more fully in Great Western, however, the Legislature has not indicated an intent to so broadly preempt the field of gun regulation. (See also Pen. Code, § 12050, subd. (b) [gun licensing subject to reasonable local time, place, and manner restrictions].)

The Nordykes also claim Penal Code section 171b has a preemptive effect. That statute prohibits the possession of firearms in "any state or local public building or at any meeting required to be open to the public," punishable by a year in county jail or state prison. (Id., subd. (a).) Section 171b, subdivision (b)(7), excepts from the prohibition on gun possession in public buildings "[a] person who, for the purpose of sale or trade, brings any weapon that may otherwise be lawfully transferred, into a gun show conducted pursuant to Sections 12071.1 and 12071.4." or "[a] person who, for purposes of an authorized public exhibition, brings any weapon that may otherwise be lawfully possessed, into a gun show conducted pursuant to Sections 12071.1 and 12071.4." The Nordykes argue that section 171b, subdivision (b)(7) prohibits the county from outlawing possession of guns at gun shows. We disagree. The provision merely exempts gun shows from the state criminal prohibition on possessing guns in public buildings, thereby permitting local government entities to authorize such shows. It does not mandate that local government entities permit such a use, and the Nordykes cite no legislative history indicating otherwise.[2]

The Nordykes point out that the Ordinance is more restrictive than state statutes inasmuch as the latter provide more exceptions to the general prohibition on possession of firearms. For example, under Penal Code section 831.4, a security officer appointed by a sheriff or police chief for the protection of government property may be authorized to carry a firearm. There is no exception in the Ordinance for such security officers. There is also no exception for animal control

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[2] As noted, the Ordinance specifically exempts from its purview all " 'local public buildings,' " as defined in Penal Code section 171b, subdivision (c). (Alameda County Gen. Ord. Code, ch. 9.12, § 9.12.120, subd. C.) The meaning of this exemption, which is debated by the parties, is not included in the certified question and we express no opinion on this matter.

officers, who may be authorized by their employing agency to use firearms (id., § 830.9), or for officers authorized to transport prisoners, who may carry firearms under certain circumstances (id., § 831.6), or for retired federal law enforcement officers (id., § 12027, subd. (i)).

We first note that the fact that certain classes of persons are exempt from state criminal prosecution for gun possession does not necessarily mean that they are exempt from local prosecution for possessing the gun on restricted county property. But even if we accept the Nordykes' argument that in at least some cases the Legislature meant to preempt local governments from criminalizing the possession of firearms by certain classes of people, that would establish at most that the Ordinance is partially preempted with respect to those classes. Partial preemption does not invalidate the Ordinance as a whole. (See Peatros v. Bank of America (2000) 22 Cal.4th 147, 173, 990 P.2d 539 (lead opn. of Mosk, J.) [National Banking Act preempts the state Fair Employment and Housing Act to the extent that the two conflict, but does not to the extent that they do not].) Specifically, such partial preemption would not affect our answer to the question at issue in this litigation: whether a county can prohibit possession of guns at gun shows held on its property. Because we generally accept certified questions only when "answering the question will facilitate the certifying court's functioning or help terminate existing litigation" (Cal. Rules of Court, rule 29.5(f)(2)), and have the discretion to restate the question (id., rule 29.5(g)), we also retain the discretion to decline to address aspects of the certified question that are immaterial to such litigation. Accordingly, we decline to address whether the Ordinance is partially preempted by the above statutes.

In sum, whether or not the Ordinance is partially preempted, Alameda County has the authority to pr hibit the operation of gun shows held on its property, and, at least to that extent, may ban possession of guns on its property.

MORENO, J.

WE CONCUR: GEORGE, C. J.

KENNARD, J.

BAXTER, J.

WERDEGAR, J.

CHIN, J.

DISSENT:
DISSENTING OPINION BY BROWN, J.

Alameda County might be able to prohibit gun shows on county property, assuming the property is located within the geographic boundaries of the county and subject to the county's regulatory jurisdiction. (Cf. Great Western Shows, Inc. v. County of Los Angeles (Apr. 22, 2002, S091547) 2001 Cal. LEXIS 2350, __ Cal.4th ___, ___ [pp. 4-18].) But the county did not enact a prohibition against gun shows. Instead, the county prohibited, with limited exceptions, the possession of firearms on county property. (Alameda County Gen. Ord. Code, ch. 9.12, § 9.12.120; see maj. opn., ante, at p. 2.) That prohibition conflicts with several state statutes that expressly authorize certain persons to carry firearms without restriction as to place. (See, e.g., Pen. Code, § § 831.4, subd. (b), 830.9, 831.6, subd. (b), 12027, subd. (i) [provisions authorizing non-peace officers to carry firearms in certain circumstances]; see also id., § § 12031, 12050, 12051 [provisions authorizing licensed persons to possess loaded and/or concealable firearms].) Nothing in state law suggests that these authorizations to carry or possess firearms under certain circumstances are subject to local restrictions, and if they were, then a person authorized to carry firearms who happened to be traveling across the state would have to consult legal counsel each time he or she crossed a county line or entered a city, a

rule that seems neither practical nor intended by the Legislature. (See Sherwin-Williams Co. v. City of Los Angeles (1993) 4 Cal.4th 893, 898, 844 P.2d 534.)

The majority concedes that state law might partially preempt the county ordinance at issue here, but it concludes that the ordinance is enforceable against plaintiffs, because plaintiffs seek only to promote a gun show. The majority, in effect, reasons that, because the county could prohibit gun shows on county property, the county is free to enforce the totally different prohibition at issue here--so long as it does so against a gun show promoter.

The flaw in this logic becomes apparent when we consider a hypothetical involving the constitutional protection of free speech. Suppose the county enacted an ordinance prohibiting any and all speech favoring residential rent control--in other words, a content-based restriction of political speech that would clearly violate First Amendment principles. A billboard company seeks to display billboard advertisements promoting rent control and challenges the ordinance on First Amendment grounds. In those circumstances, I doubt the majority would hold that, because the county is free to regulate billboard advertising (see City Council v. Taxpayers for Vincent (1984) 466 U.S. 789, 806-807, 80 L. Ed. 2d 772, 104 S. Ct. 2118; Metromedia, Inc. v. San Diego (1981) 453 U.S. 490, 507-512, 69 L. Ed. 2d 800, 101 S. Ct. 2882; City and County of San Francisco v. Eller Outdoor Advertising (1987) 192 Cal. App. 3d 643, 658-661, 237 Cal. Rptr. 815), it can enforce its unconstitutional restriction of speech against the billboard company. Rather, the majority would likely hold that the ordinance exceeds the county's regulatory authority under the state and federal Constitutions. Put another way, the question before us is not whether the county might be able to enact some hypothetical ordinance prohibiting what plaintiffs want to do. The question is whether the ordinance the county actually enacted exceeds the county's authority, which it does.

Significantly, this case is not one in which we are asked to enforce an independent provision in an ordinance after severing a preempted provision. (See, e.g., Cohen v. Board of Supervisors (1985) 40 Cal.3d 277, 292, 219 Cal. Rptr. 467, 707 P.2d 840.) Rather, the provision that the majority enforces--the prohibition against possessing firearms on county property--is the same provision that conflicts with state law. Nor is this a case where the ordinance is ambiguous and might be construed narrowly so as to avoid preemption problems. (See, e.g., In re Cox (1970) 3 Cal.3d 205, 220, fn. 18, 90 Cal. Rptr. 24, 474 P.2d 992.) No one could reasonably construe a general prohibition against firearm possession to refer only to gun shows, and no one reading the ordinance without the benefit of a law degree and a careful study of our decisions would guess that the ordinance merely refers to gun shows.

In short, we consider here a local restriction on firearm possession that directly conflicts with state law. The majority seeks to avoid the obvious preemption problem by the expedient of rewriting the ordinance to prohibit gun shows instead of gun possession. Alameda County might have enacted an ordinance prohibiting gun shows, but it did not, and the ordinance it did enact exceeds its regulatory authority.

The majority attempts to make the issue quite small, involving a restriction applicable only to county property (maj. opn., ante, at p. 7); the litigants, on the other hand, insist the stakes are large. It does not matter whether the issue is large or small, though, if the government exceeds its authority. As Judge Kozinski has noted, the small and superficially benign acts of a democratic government can erode personal freedom just as surely, and to the same end, as the large and malignant acts of a tyrant or dictator: "Liberty--the freedom from unwanted intrusion by government--is as easily lost through insistent nibbles by government officials who seek to do their jobs too well as by those whose purpose it is to oppress . . . ." (U.S. v. $ 124,570 U.S. Currency (1989) 873 F.2d 1240, 1246.) Because

the ordinance conflicts with state law and because I believe the structural constraints on government authority are equally as important as the substantive ones, I dissent.

BROWN, J.

ALAMEDA COUNTY ORDINANCE

Section 9.12.120 Possession of firearms on county property prohibited.

A. Findings. The board of supervisors finds that gunshot fatalities and injuries are of epidemic proportions in Alameda County. During the first five years of the 1990's, eight hundred seventy-nine (879) homicides were committed using firearms, and an additional one thousand six hundred forty-seven (1,647) victims were hospitalized with gunshot injuries. Firearms are the leading cause of death among young people between the ages of fifteen (15) and twenty-four (24) in Alameda County. Between July 1, 1996 and June 30, 1997, one hundred thirty-six (136) juveniles were arrested in Oakland for gun-related offenses. On July 4, 1998 a shooting incident on the Alameda County Fairgrounds resulted in several gunshot wounds, other injuries and panic among fair goers. Prohibiting the possession of firearms on county property will promote the public health and safety by contributing to the reduction of gunshot fatalities and injuries in the county.

B. Misdemeanor. Every person who brings onto or possesses on county property a firearm, loaded or unloaded, or ammunition for a firearm is guilty of a misdemeanor.

C. County Property. As used in this section, the term county property means real property, including any buildings thereon, owned or leased by the county of Alameda (hereinafter "county"), and in the county's possession, or in the possession of a public or private entity under contract with the county to perform a public purpose, including but not limited to real property owned or leased by the county in the unincorporated and incorporated portions of the county, such as the county park in Sunol and the Alameda County Fairgrounds in the city of Pleasanton, but does not include any "local public building" as

defined in Penal Code Section 171b(c), where the state regulates possession of firearms pursuant to Penal Code Section 171b.

D. Firearm. "Firearm" is any gun, pistol, revolver, rifle or any device, designed or modified to be used as a weapon, from which is expelled through a barrel a projectile by the force of an explosion or other form of combustion. "Firearm" does not include imitation firearms or BB guns and air rifles as defined in Government Code Section 53071.5.

E. Ammunition. "Ammunition" is any ammunition as defined in Penal Code Section 12316(b)(2).

F. Exceptions. Subsection 9.12.120B does not apply to the following:

1. A peace officer as defined in Title 3, Part 2, Chapter 4.5 of the California Penal Code (Sections 830 et seq.);

2. A guard or messenger of a financial institution, a guard of a contract carrier operating an armored vehicle, a licensed private investigator, patrol operator, or alarm company operator, or uniformed security guard as these occupations are defined in Penal Code Section 12031(d) and who holds a valid certificate issued by the Department of Consumer Affairs under Penal Code Section 12033, while actually employed and engaged in protecting and preserving property or life within the scope of his or her employment;

3. A person holding a valid license to carry a firearm issued pursuant to Penal Code Section 12050;

4 The possession of a firearm by an authorized participant in a motion picture, television, video, dance

or theatrical production or event, when the participant lawfully uses the firearm as part of that production or event, provided that when such firearm is not in the actual possession of the authorized participant, it is secured to prevent unauthorized use.

5. A person lawfully transporting firearms or ammunition in a motor vehicle on county roads;

6. A person lawfully using the target range operated by the Alameda County sheriff;

7. A federal criminal investigator or law enforcement officer; or

8. A member of the military forces of the state of California or of the United States while engaged in the performance of his or her duty.

G. Severability. If any provision of this section or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect any other provision or application of this section which can be given effect without the invalid provision or application, and to this end the provisions of this section are severable.

(Ord. 2000-22, 1999: Ord. 2000-11 §§ 1)

The Right to Keep and Bear Arms

REPORT

of the

SUBCOMMITTEE ON THE CONSTITUTION*

of the

UNITED STATES SENATE

NINETY-SEVENTH CONGRESS

Second Session

February 1982

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* This is an excerpt and omits the "Other Views of the Second Amendment" section.

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- Other views of the second amendment:
- Does the Second Amendment mean what it says?, by David J. Steinberg, executive director, National Council for a Responsible Firearms policy.
- National Coalition to ban handguns, statement on the Second Amendment, by Michael K. Beard, executive director, and Samuel S. Fields, legal affairs coordinator, National Coalition to Ban Handguns.
- Historical Bases of the Right to Keep and Bear Arms, by David T. Hardy, partner in the Law Firm Sando & Hardy.
- The Fourteenth Amendment and the Right to Keep and Bear Arms: The Intent of the Framers, by Stephen P. Halbrook, PH. D., attorney and counselor at law.
- The Second Amendment to the United States Constitution Guarantees an Individual Right To Keep and Bear Arms, by James J. Featherstone, Esq., General Counsel, Richard E. Gardiner, Esq., and Robert Dowlut, Esq., Office of the General Counsel, National Rifle Association of America.
- The Right to Bear Arms: The Development of the American Experience, by John Levin, assistant professor, Chicago-Kent College of Law, Illinois Institute of Technology.
- Standing Armies and Armed Citizens: An Historical Analysis of The Second Amendment, by Roy G. Weatherup, J.D., 1972 Standford University; member of the California Bar.
- Gun control legislation, by the Committee on Federal Legislation, the Association of the Bar of the City of New York.

PREFACE

"To preserve liberty, it is essential that the whole body of the people always possess arms, and be taught alike, especially when young, how to use them." (Richard Henry Lee, Virginia delegate to the Continental Congress, initiator of the Declaration of Independence, and member of the first Senate, which passed the Bill of Rights.)

"The great object is that every man be armed . . . Everyone who is able may have a gun." (Patrick Henry, in the Virginia Convention on the ratification of the Constitution.)

"The advantage of being armed . . . the Americans possess over the people of all other nations . . . Notwithstanding the military establishments in the several Kingdoms of Europe, which are carried as far as the public resources will bear, the governments are afraid to trust the people with arms." (James Madison, author of the Bill of Rights, in his Federalist Paper No. 46.)

"A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed." (Second Amendment to the Constitution.)

In my studies as an attorney and as a United States Senator, I have constantly been amazed by the indifference or even hostility shown the Second Amendment by courts, legislatures, and commentators. James Madison would be startled to hear that his recognition of a right to keep and bear arms, which passed the House by a voice vote without objection and hardly a debate, has since been construed in but a single, and most ambiguous Supreme Court decision, whereas his proposals for freedom of religion, which he made reluctantly

out of fear that they would be rejected or narrowed beyond use, and those for freedom of assembly, which passed only after a lengthy and bitter debate, are the subject of scores of detailed and favorable decisions. Thomas Jefferson, who kept a veritable armory of pistols, rifles and shotguns at Monticello, and advised his nephew to forsake other sports in favor of hunting, would be astounded to hear supposed civil libertarians claim firearm ownership should be restricted. Samuel Adams, a handgun owner who pressed for an amendment stating that the "Constitution shall never be construed . . . to prevent the people of the United States who are peaceable citizens from keeping their own arms," would be shocked to hear that his native state today imposes a year's sentence, without probation or parole, for carrying a firearm without a police permit.

This is not to imply that courts have totally ignored the impact of the Second Amendment in the Bill of Rights. No fewer than twenty-one decisions by the courts of our states have recognized an individual right to keep and bear arms, and a majority of these have not only recognized the right but invalidated laws or regulations which abridged it. Yet in all too many instances, courts or commentators have sought, for reasons only tangentially related to constitutional history, to construe this right out of existence. They argue that the Second Amendment's words "right of the people" mean "a right of the state" — apparently overlooking the impact of those same words when used in the First and Fourth Amendments. The "right of the people" to assemble or to be free from unreasonable searches and seizures is not contested as an individual guarantee. Still they ignore consistency and claim that the right to "bear arms" relates only to military uses. This not only violates a consistent constitutional reading of "right of the people" but also ignores that the second amendment protects a right to "keep" arms. These commentators contend instead that the amendment's preamble regarding the necessity of a "well regulated militia . . . to a free state" means that the right to keep

and bear arms applies only to a National Guard. Such a reading fails to note that the Framers used the term "militia" to relate to every citizen capable of bearing arms, and that the Congress has established the present National Guard under its own power to raise armies, expressly stating that it was not doing so under its power to organize and arm the militia.

When the first Congress convened for the purpose of drafting a Bill of Rights, it delegated the task to James Madison. Madison did not write upon a blank tablet. Instead, he obtained a pamphlet listing the State proposals for a bill of rights and sought to produce a briefer version incorporating all the vital proposals of these. His purpose was to incorporate, not distinguish by technical changes, proposals such as that of the Pennsylvania minority, Sam Adams, or the New Hampshire delegates. Madison proposed among other rights that "That right of the people to keep and bear arms shall not be infringed; a well armed and well regulated militia being the best security of a free country; but no person religiously scrupulous of bearing arms shall be compelled to render military service in person." I n the House, this was initially modified so that the militia clause came before the proposal recognizing the right. The proposals for the Bill of Rights were then trimmed in the interests of brevity. The conscientious objector clause was removed following objections by Elbridge Gerry, who complained that future Congresses might abuse the exemption to excuse everyone from military service.

The proposal finally passed the House in its present form: "A well regulated militia, being necessary for the preservation of a free state, the right of the people to keep and bear arms shall not be infringed." In this form it was submitted into the Senate, which passed it the following day. The Senate in the process indicated its intent that the right be an individual one, for private purposes, by rejecting an amendment which would have limited the keeping and bearing of arms to bearing

"For the common defense".

The earliest American constitutional commentators concurred in giving this broad reading to the amendment. When St. George Tucker, later Chief Justice of the Virginia Supreme Court, in 1803 published an edition of Blackstone annotated to American law, he followed Blackstone's citation of the right of the subject "of having arms suitable to their condition and degree, and such as are allowed by law" with a citation to the Second Amendment, "And this without any qualification as to their condition or degree, as is the case in the British government." William Rawle's "View of the Constitution" published in Philadelphia in 1825 noted that under the Second Amendment: "The prohibition is general. No clause in the Constitution could by a rule of construction be conceived to give to Congress a power to disarm the people. Such a flagitious attempt could only be made under some general pretense by a state legislature. But if in blind pursuit of inordinate power, either should attempt it, this amendment may be appealed to as a restraint on both." The Jefferson papers in the Library of Congress show that both Tucker and Rawle were friends of, and corresponded with, Thomas Jefferson. Their views are those of contemporaries of Jefferson, Madison and others, and are entitled to special weight. A few years later, Joseph Story in his "Commentaries on the Constitution" considered the right to keep and bear arms as "the palladium of the liberties of the republic", which deterred tyranny and enabled the citizenry at large to overthrow it should it come to pass.

Subsequent legislation in the second Congress likewise supports the interpretation of the Second Amendment that creates an individual right. In the Militia Act of 1792, the second Congress defined "militia of the United States" to include almost every free adult male in the United States. These persons were obligated by law to possess a firearm and a

minimum supply of ammunition and military equipment. This statute, incidentally, remained in effect into the early years of the present century as a legal requirement of gun ownership for most of the population of the United States. There can by little doubt from this that when the Congress and the people spoke of a "militia", they had reference to the traditional concept of the entire populace capable of bearing arms, and not to any formal group such as what is today called the National Guard. The purpose was to create an armed citizenry, which the political theorists at the time considered essential to ward off tyranny. From this militia, appropriate measures might create a "well regulated militia" of individuals trained in their duties and responsibilities as citizens and owners of firearms.

If gun laws in fact worked, the sponsors of this type of legislation should have no difficulty drawing upon long lists of examples of crime rates reduced by such legislation. That they cannot do so after a century and a half of trying — that they must sweep under the rug the southern attempts at gun control in the 1870-1910 period, the northeastern attempts in the 1920-1939 period, the attempts at both Federal and State levels in 1965-1976 — establishes the repeated, complete and inevitable failure of gun laws to control serious crime.

Immediately upon assuming chairmanship of the Subcommittee on the Constitution, I sponsored the report which follows as an effort to study, rather than ignore, the history of the controversy over the right to keep and bear arms. Utilizing the research capabilities of the Subcommittee on the Constitution, the resources of the Library of Congress, and the assistance of constitutional scholars such as Mary Kaaren Jolly, Steven Halbrook, and David T. Hardy, the subcommittee has managed to uncover information on the right to keep and bear arms which documents quite clearly its status as a major individual right of American citizens. We did not guess at the purpose of the British 1689 Declaration of Rights; we located

the Journals of the House of Commons and private notes of the Declaration's sponsors, now dead for two centuries. We did not make suppositions as to colonial interpretations of that Declaration's right to keep arms; we examined colonial newspapers which discussed it. We did not speculate as to the intent of the framers of the second amendment; we examined James Madison's drafts for it, his handwritten outlines of speeches upon the Bill of Rights, and discussions of the second amendment by early scholars who were personal friends of Madison, Jefferson, and Washington while these still lived. What the Subcommittee on the Constitution uncovered was clear — and long lost — proof that the second amendment to our Constitution was intended as an individual right of the American citizen to keep and carry arms in a peaceful manner, for protection of himself, his family, and his freedoms. The summary of our research and findings form the first portion of this report.

In the interest of fairness and the presentation of a complete picture, we also invited groups which were likely to oppose this recognition of freedoms to submit their views. The statements of two associations who replied are reproduced here following the report of the Subcommittee. The Subcommittee also invited statements by Messrs. Halbrook and Hardy, and by the National Rifle Association, whose statements likewise follow our report.

When I became chairman of the Subcommittee on the Constitution, I hoped that I would be able to assist in the protection of the constitutional rights of American citizens, rights which have too often been eroded in the belief that government could be relied upon for quick solutions to difficult problems.

Both as an American citizen and as a United States Senator I repudiate this view. I likewise repudiate the approach

of those who believe to solve American problems you simply become something other than American. To my mind, the uniqueness of our free institutions, the fact that an American citizen can boast freedoms unknown in any other land, is all the more reason to resist any erosion of our individual rights. When our ancestors forged a land "conceived in liberty", they did so with musket and rifle. When they reacted to attempts to dissolve their free institutions, and established their identity as a free nation, they did so as a nation of armed freemen. When they sought to record forever a guarantee of their rights, they devoted one full amendment out of ten to nothing but the protection of their right to keep and bear arms against governmental interference. Under my chairmanship the Subcommittee on the Constitution will concern itself with a proper recognition of, and respect for, this right most valued by free men.

Orrin G. Hatch, Chairman
Subcommittee on the Constitution
January 20, 1982

The right to bear arms is a tradition with deep roots in American society. Thomas Jefferson proposed that "no free man shall ever be debarred the use of arms," and Samuel Adams called for an amendment banning any law "to prevent the people of the United States who are peaceable citizens from keeping their own arms." The Constitution of the State of Arizona, for example, recognizes the "right of an individual citizen to bear arms in defense of himself or the State."

Even though the tradition has deep roots, its application to modern America is the subject of intense controversy. Indeed, it is a controversy into which the Congress is beginning, once again, to immerse itself. I have personally been disappointed that so important an issue should have generally been so thinly researched and so minimally debated both in Congress and the courts. Our Supreme Court has but once touched on its meaning at the Federal level and that decision, now nearly a half-century old, is so ambiguous that any school of thought can find some support in it. All Supreme Court decisions on the second amendment's application to the States came in the last century, when constitutional law was far different than it is today. As ranking minority member of the Subcommittee on the Constitution, I, therefore, welcome the effort which led to this report — a report based not only upon the independent research of the subcommittee staff, but also upon full and fair presentation of the cases by all interested groups and individual scholars.

I personally believe that it is necessary for the Congress to amend the Gun Control Act of 1968. I welcome the opportunity to introduce this discussion of how best these amendments might be made.

The Constitution subcommittee staff has prepared this monograph bringing together proponents of both sides of the debate over the 1968 Act. I believe that the statements

contained herein present the arguments fairly and thoroughly. I commend Senator Hatch, chairman of the subcommittee, for having this excellent reference work prepared. I am sure that it will be of great assistance to the Congress as it debates the second amendment and considers legislation to amend the Gun Control Act.

Dennis DeConcini,
Ranking Minority Member,
Subcommittee on the Constitution
January 20, 1982

History:
Second Amendment Right to "Keep and Bear Arms"

The right to keep and bear arms as a part of English and American law antedates not only the Constitution, but also the discovery of firearms. Under the laws of Alfred the Great, whose reign began in 872 A.D., all English citizens from the nobility to the peasants were obliged to privately purchase weapons and be available for military duty. [1] This was in sharp contrast to the feudal system as it evolved in Europe, under which armament and military duties were concentrated in the nobility. The body of armed citizens were known as the "fyrd".

While a great many of the Saxon rights were abridged following the Norman conquest, the right and duty of arms possession was retained. Under the Assize of Arms of 1181, "the whole community of freemen" between the ages of 15 and 40 were required by law to possess certain arms, which were arranged in proportion to their possessions.[2] They were required twice a year to demonstrate to Royal officials that they were appropriately armed. In 1253, another Assize of Arms expanded the duty of armament to include not only freemen, but also villeins, who were the English equivalent of serfs. Now all "citizens, burgesses, free tenants, villeins and others from 15 to 60 years of age" were obligated to be armed.[3] While on the Continent the villeins were regarded as little more than animals hungering for rebellion, the English legal system not only permitted, but affirmatively required them, to be armed.

The thirteenth century saw further definitions of this right as the long bow, a formidable armor-piercing weapon, became increasingly the mainstay of British national policy. In 1285, Edward I commanded that all persons comply with the earlier Assizes and added that "anyone else who can afford them shall keep bows and arrows." [4] The right of armament was

subject only to narrow limitations. In 1279, it was ordered that those appearing in Parliament or other public assemblies "shall come without all force and armor, well and peaceably". [5] In 1328, the statute of Northampton ordered that no one use their arms in "affray of the peace, nor to go nor ride armed by day or by night in fairs, markets, nor in the presence of the justices or other ministers." [6] English courts construed this ban consistently with the general right of private armament as applying only to wearing of arms "accompanied with such circumstances as are apt to terrify the people." [7] In 1369, the King ordered that the sheriffs of London require all citizens "at leisure time on holidays" to "use in their recreation bowes and arrows" and to stop all other games which might distract them from this practice. [8]

The Tudor kings experimented with limits upon specialized weapons — mainly crossbows and the then-new firearms. These measures were not intended to disarm the citizenry, but on the contrary, to prevent their being diverted from longbow practice by sport with other weapons which were considered less effective. Even these narrow measures were shortlived. In 1503, Henry VII limited shooting (but not possession) of crossbows to those with land worth 200 marks annual rental, but provided an exception for those who "shote owt of a howse for the lawefull defens of the same". [9] In 1511, Henry VIII increased the property requirement to 300 marks. He also expanded the requirement of longbow ownership, requiring all citizens to "use and exercyse shootyng in longbowes, and also have a bowe and arrowes contynually" in the house. [10] Fathers were required by law to purchase bows and arrows for their sons between the age of 7 and 14 and to train them in longbow use.

In 1514 the ban on crossbows was extended to include firearms. [11] But in 1533, Henry reduced the property qualification to 100 pounds per year; in 1541 he limited it to

possession of small firearms ("of the length of one hole yard" for some firearms and "thre quarters of a yarde" for others)[12] and eventually he repealed the entire statute by proclamation.[13] The later Tudor monarchs continued the system and Elizabeth added to it by creating what came to be known as "train bands", selected portions of the citizenry chosen for special training. These trained bands were distinguished from the "militia", which term was first used during the Spanish Armada crisis to designate the entire of the armed citizenry. [14]

The militia continued to be a pivotal force in the English political system. The British historian Charles Oman considers the existence of the armed citizenry to be a major reason for the moderation of monarchical rule in Great Britain; "More than once he [Henry VIII] had to restrain himself, when he discovered that the general feeling of his subjects was against him... His 'gentlemen pensioners' and yeomen of the guard were but a handful, and bills or bows were in every farm and cottage". [15]

When civil war broke out in 1642, the critical issue was whether the King or Parliament had the right to control the militia. [16] The aftermath of the civil war saw England in temporary control of a military government, which repeated dissolved Parliament and authorized its officers to "search for, and seize all arms" owned by Catholics, opponents of the government, "or any other person whom the commissioners had judged dangerous to the peace of this Commonwealth". [17]

The military government ended with the restoration of Charles II. Charles in turn opened his reign with a variety of repressive legislation, expanding the definition of treason, establishing press censorship and ordering his supporters to form their own troops, "the officers to be numerous, disaffected persons watched and not allowed to assemble, and their arms seized".[18] In 1662, a Militia Act was enacted empowering

officials " to search for and seize all arms in the custody or possession of any person or persons whom the said lieutenants or any two or more of their deputies shall judge dangerous to the peace of the kingdom".[19] Gunsmiths were ordered to deliver to the government lists of all purchasers.[20] These confiscations were continued under James II, who directed them particularly against the Irish population: "Although the country was infested by predatory bands, a Protestant gentleman could scarcely obtain permission to keep a brace of pistols."[21]

In 1668, the government of James was overturned in a peaceful uprising which came to be know as "The Glorious Revolution". Parliament resolved that James had abdicated and promulgated a Declaration of Rights, later enacted as the Bill of Rights. Before coronation, his successor William of Orange, was required to swear to respect these rights. The debates in the House of Commons over this Declaration of Rights focused largely upon the disarmament under the 1662 Militia Act. One member complained that "an act of Parliament was made to disarm all Englishmen, who the lieutenant should suspect, by day or night, by force or otherwise — this was done in Ireland for the sake of putting arms into Irish hands." The speech of another is summarized as "militia bill — power to disarm all England — now done in Ireland." A third complained "Arbitrary power exercised by the ministry. . . . Militia — imprisoning without reason; disarming — himself disarmed." Yet another summarized his complaints "Militia Act — an abominable thing to disarm the nation...." [22]

The Bill of Rights, as drafted in the House of Commons, simply provided that "the acts concerning the militia are grievous to the subject" and that "it is necessary for the public Safety that the Subjects, which are Protestants, should provide and keep arms for the common defense; And that the Arms which have been seized, and taken from them, be restored." [23] The House of Lords changed this to make it a more positive

declaration of an individual right under English law: "That the subjects which are Protestant may have arms for their defense suitable to their conditions and as allowed by law." [24] The only limitation was on ownership by Catholics, who at that time composed only a few percent of the British population and were subject to a wide variety of punitive legislation. The Parliament subsequently made clear what it meant by "suitable to their conditions and as allowed by law". The poorer citizens had been restricted from owning firearms, as well as traps and other commodities useful for hunting, by the 1671 Game Act. Following the Bill of Rights, Parliament reenacted that statute, leaving its operative parts unchanged with one exception — which removed the word "guns" from the list of items forbidden to the poorer citizens. [25] The right to keep and bear arms would henceforth belong to all English subjects, rich and poor alike.

In the colonies, availability of hunting and need for defense led to armament statutes comparable to those of the early Saxon times. In 1623, Virginia forbade its colonists to travel unless the were "well armed"; in 1631 it required colonists to engage in target practice on Sunday and "to bring their peeces to church." [26] In 1658 it required every householder to have a functioning firearm within his house and in 1673 its laws provided that a citizen who claimed he was too poor to purchase a firearm would have one purchased for him by the government, which would then require him to pay a reasonable price when able to do so. [27] In Massachusetts, the first session of the legislature ordered that not only freemen, but also indentured servants own firearms and in 1644 it imposed a stern 6 shilling fine upon any citizen who was not armed. [28]

When the British government began to increase its military presence in the colonies in the mid-eighteenth century, Massachusetts responded by calling upon its citizens to arm themselves in defense. One colonial newspaper argued that it was impossible to complain that this act was illegal since they

were "British subjects, to whom the privilege of possessing arms is expressly recognized by the Bill of Rights" while another argued that this "is a natural right which the people have reserved to themselves, confirmed by the Bill of Rights, to keep arms for their own defense". [29] The newspaper cited Blackstone's commentaries on the laws of England, which had listed the "having and using arms for self preservation and defense" among the "absolute rights of individuals." The colonists felt they had an absolute right at common law to own firearms.

Together with freedom of the press, the right to keep and bear arms became one of the individual rights most prized by the colonists. When British troops seized a militia arsenal in September, 1774, and incorrect rumors that colonists had been killed spread through Massachusetts, 60,000 citizens took up arms. [30] A few months later, when Patrick Henry delivered his famed "Give me liberty or give me death" speech, he spoke in support of a proposition "that a well regulated militia, composed of gentlemen and freemen, is the natural strength and only security of a free government...." Throughout the following revolution, formal and informal units of armed citizens obstructed British communication, cut off foraging parties, and harassed the thinly stretched regular forces. When seven states adopted state "bills of rights" following the Declaration of Independence, each of those bills of rights provided either for protection of the concept of a militia or for an express right to keep and bear arms. [31]

Following the revolution but previous to the adoption of the Constitution, debates over militia proposals occupied a large part of the political scene. A variety of plans were put forth by figures ranging from George Washington to Baron von Steuben. [32] All the proposals called for a general duty of all citizens to be armed, although some proposals (most notably von Steuben's) also emphasized a "select militia" which would be paid for its

services and given special training. In this respect, this "select militia" was the successor of the "trained bands" and the predecessor of what is today the "national guard". In the debates over the Constitution, von Steuben's proposals were criticized as undemocratic. In Connecticut on writer complained of a proposal that "this looks too much like Baron von Steuben's militia, by which a standing army was meant and intended." [33] In Pennsylvania, a delegate argued "Congress may give us a select militia which will, in fact, be a standing army — or Congress, afraid of a general militia, may say there will be no militia at all. When a select militia is formed, the people in general may be disarmed." [34] Richard Henry Lee, in his widely read pamphlet "Letters from the Federal Farmer to the Republican" worried that the people might be disarmed "by modeling the militia. Should one fifth or one eighth part of the people capable of bearing arms be made into a select militia, as has been proposed, and those the young and ardent parts of the community, possessed of little or no property, the former will answer all the purposes of an army, while the latter will be defenseless." He proposed that "the Constitution ought to secure a genuine, and guard against a select militia," adding that "to preserve liberty, it is essential that the whole body of the people always possess arms and be taught alike, especially when young, how to use them." [35]

The suspicion of select militia units expressed in these passages is a clear indication that the framers of the Constitution did not seek to guarantee a State right to maintain formed groups similar to the National Guard, but rather to protect the right of individual citizens to keep and bear arms. Lee, in particular, sat in the Senate which approved the Bill of Rights. He would hardly have meant the second amendment to apply only to the select militias he so feared and disliked.

Other figures of the period were of like mind. In the Virginia convention, George Mason, drafter of the Virginia Bill

of Rights, accused the British of having plotted "to disarm the people — that was the best and most effective way to enslave them", while Patrick Henry observed that, "The great object is that every man be armed" and "everyone who is able may have a gun". [36]

Nor were the antifederalists, to whom we owe credit for a Bill of Rights, alone on this account. Federalist arguments also provide a source of support for an individual rights view. Their arguments in favor of the proposed Constitution also relied heavily upon universal armament. The proposed Constitution had been heavily criticized for its failure to ban or even limit standing armies. Unable to deny this omission, the Constitution's supporters frequently argued to the people that the universal armament of Americans made such limitations unnecessary. A pamphlet written by Noah Webster, aimed at swaying Pennsylvania toward ratification, observed.

> Before a standing army can rule, the people must be disarmed; as they are in almost every kingdom in Europe. The supreme power in America cannot enforce unjust laws by the sword, because the whole body of the people are armed, and constitute a force superior to any band of regular troops that can be, on any pretense, raised in the United States. [37]

In the Massachusetts convention, Sedgewick echoed the same thought, rhetorically asking an oppressive army could be formed or "if raised, whether they could subdue a Nation of freemen, who know how to prize liberty, and who have arms in their hands?" [38] In Federalist Paper 46, Madison, later author of the Second Amendment, mentioned "The advantage of being armed, which the Americans possess over the people of all other countries" and that "notwithstanding the military establishments in the several kingdoms of Europe, which are

carried as far as the public resources will bear, the governments are afraid to trust the people with arms."

A third and even more compelling case for an individual rights perspective on the Second Amendment comes from the State demands for a bill of rights. Numerous state ratifications called for adoption of a Bill of Rights as a part of the Constitution. The first such call came from a group of Pennsylvania delegates. Their proposals, which were not adopted but had a critical effect on future debates, proposed among other rights that "the people have a right to bear arms for the defense of themselves and their own state, or the United States, or for the purpose of killing game; and no law shall be passed for disarming the people or any of them, unless for crimes committed, or a real danger of public injury from individuals." [39] In Massachusetts, Sam Adams unsuccessfully pushed for a ratification conditioned on adoption of a Bill of Rights, beginning with a guarantee "That the said Constitution shall never be construed to authorize Congress to infringe the just liberty of the press or the rights of conscience; or to prevent the people of the United States who are peaceable citizens from keeping their own arms...." [40] When New Hampshire gave the Constitution the ninth vote needed for its passing into effect, it called for adoption of a Bill of Rights which included the provision that "Congress shall never disarm any citizen unless such as are or have been in actual rebellion". [41] Virginia and North Carolina thereafter called for a provision "that the people have the right to keep and bear arms; that a well regulated militia composed of the body of the people trained to arms is the proper, natural and safe defense of a free state." [42]

When the first Congress convened for the purpose of drafting a Bill of Rights, it delegated the task to James Madison. Madison did not write upon a blank tablet. Instead, he obtained a pamphlet listing the State proposals for a Bill of Rights and sought to produce a briefer version incorporating all the vital

proposals of these. His purpose was to incorporate, not distinguish by technical changes, proposals such as that of the Pennsylvania minority, Sam Adams, and the New Hampshire delegates. Madison proposed among other rights that:

> The right of the people to keep and bear arms shall not be infringed; a well armed and well regulated militia being the best security of a free country; but no person religiously scrupulous of bearing arms shall be compelled to render military service." [43]

In the House, this was initially modified so that the militia clause came before the proposal recognizing the right. The proposals for the Bill of Rights were then trimmed in the interests of brevity. The conscientious objector clause was removed following objections by Eldridge Gerry, who complained that future Congresses might abuse the exemption for the scrupulous to excuse everyone from military service.

The proposal finally passed the House in its present form: "A well regulated militia, being necessary for the security of a free state, the right of the people to keep and bear arms, shall not be infringed." In this form it was submitted to the Senate, which passed it the following day. The Senate in the process indicated its intent that the right be an individual one, for private purposes, by rejecting an amendment which would have limited the keeping and bearing of arms to bearing "for the common defense".

The earliest American constitutional commentators concurred in giving this broad reading to the amendment. When St. George Tucker, later Chief Justice of the Virginia Supreme Court, in 1803 published an edition of Blackstone annotated to American law, he followed Blackstone's citation of the right of the subject"of having arms suitable to their condition and

degree, and such as are allowed by law" with a citation to the Second Amendment, "And this without any qualification as to their condition or degree, as is the case in the British government." [44] William Rawle's "View of the Constitution" published in Philadelphia in 1825 noted that under the Second Amendment

> "The prohibition is general. No clause in the Constitution could by a rule of construction be conceived to give to Congress a power to disarm the people. Such a flagitious attempt could only be made under some general pretense by a state legislature. But if in blind pursuit of inordinate power, either should at tempt it, this amendment may be appealed to as a restraint on both." [45]

The Jefferson papers in the Library of Congress show that both Tucker and Rawle were friends of, and corresponded with, Thomas Jefferson. This suggests that their assessment, as contemporaries of the Constitution's drafters, should be afforded special consideration.

Later commentators agreed with Tucker and Rawle. For instance, Joseph Story in his "Commentaries on the Constitution" considered the right to keep and bear arms as "the palladium of the liberties of the republic", which deterred tyranny and enabled the citizenry at large to overthrow it should it come to pass. [46]

Subsequent legislation in the second Congress likewise supports the interpretation of the Second Amendment that creates an individual right. In the Militia Act of 1792, the second Congress defined "militia of the United States" to include almost every free adult male in the United States. These

persons were obligated by law to possess a firearm and a minimum supply of ammunition and military equipment. [47] This statute, incidentally, remained in effect into the early years of the present century as a legal requirement of gun ownership for most of the population of the United States. There can by little doubt from this that when the Congress and the people spoke of a "militia", they had reference to the traditional concept of the entire populace capable of bearing arms, and not to any formal group such as what is today called the National Guard. The purpose was to create an armed citizenry, such as the political theorists at the time considered essential to ward off tyranny. From this militia, appropriate measures might create a "well regulated militia" of individuals trained in their duties and responsibilities as citizens and owners of firearms.

The Second Amendment as such was rarely litigated prior to the passage of the Fourteenth Amendment. Prior to that time, most courts accepted that the commands of the federal Bill of Rights did not apply to the states. Since there was no federal firearms legislation at this time, there was no legislation which was directly subject to the Second Amendment, if the accepted interpretations were followed. However, a broad variety of state legislation was struck down under state guarantees of the right to keep and bear arms and even in a few cases, under the Second Amendment, when it came before courts which considered the federal protections applicable to the states. Kentucky in 1813 enacted the first carrying concealed weapon statute in the United States; in 1822, the Kentucky Court of Appeals struck down the law as a violation of the state constitutional protection of the right to keep and bear arms; "And can there be entertained a reasonable doubt but the provisions of that act import a restraint on the right of the citizen to bear arms? The court apprehends it not. The right existed at the adoption of the Constitution; it then had no limit short of the moral power of the citizens to exercise it, and in fact consisted of nothing else but the liberty of the citizen to

bear arms." [48] On the other hand, a similar measure was sustained in Indiana, not upon the grounds that a right to keep and bear arms did not apply, but rather upon the notion that a statute banning only concealed carrying still permitted the carrying of arms and merely regulated on possible way of carrying them. [49] A few years later, the Supreme Court of Alabama upheld a similar statute but added, "We do not desire to be understood as maintaining, that in regulating the manner of wearing arms, the legislature has no other limit than its own discretion. A statute which, under the pretense of regulation, amounts to a destruction of that right, or which requires arms to be so borne as to render them wholly useless for the purpose of defense, would be clearly unconstitutional." [50] When the Arkansas Supreme Court in 1842 upheld a carrying concealed weapons statute, the chief justice explained that the statute would not "detract anything from the power of the people to defend their free state and the established institutions of the country. It prohibits only the wearing of certain arms concealed. This is simply a regulation as to the manner of bearing such arms as are specified", while the dissenting justice proclaimed "I deny that any just or free government upon earth has the power to disarm its citizens". [51]

Sometimes courts went farther. When in 1837, Georgia totally banned the sale of pistols (excepting the larger pistols "known and used as horsemen's pistols") and other weapons, the Georgia Supreme Court in Nunn v. State held the statute unconstitutional under the Second Amendment to the federal Constitution. The court held that the Bill of Rights protected natural rights which were fully as capable of infringement by states as by the federal government and that the Second Amendment provided "the right of the whole people, old and young, men, women and boys, and not militia only, to keep and bear arms of every description, and not merely such as are used by the militia, shall not be infringed, curtailed, or broken in on, in the slightest degree; and all this for the important end to be

attained: the rearing up and qualifying of a well regulated militia, so vitally necessary to the security of a free state." [52] Prior to the Civil War, the Supreme Court of the United States likewise indicated that the privileges of citizenship included the individual right to own and carry firearms. In the notorious Dred Scott case, the court held that black Americans were not citizens and could not be made such by any state. This decision, which by striking down the Missouri Compromise did so much to bring on the Civil War, listed what the Supreme Court considered the rights of American citizens by way of illustrating what rights would have to be given to black Americans if the Court were to recognize them as full fledged citizens:

> It would give to persons of the negro race, who are recognized as citizens in any one state of the Union, the right to enter every other state, whenever they pleased. . . .and it would give them full liberty of speech in public and in private upon all subjects upon which its own citizens might meet; to hold public meetings upon political affairs, and to keep and carry arms wherever they went. [53]

Following the Civil War, the legislative efforts which gave us three amendments to the Constitution and our earliest civil rights acts likewise recognized the right to keep and bear arms as an existing constitutional right of the individual citizen and as a right specifically singled out as one protected by the civil rights acts and by the Fourteenth Amendment to the Constitution, against infringement by state authorities. Much of the reconstruction effort in the South had been hinged upon the creation of "black militias" composed of the armed and newly freed blacks, officered largely by black veterans of the Union Army. In the months after the Civil War, the existing southern governments struck at these units with the enactment of "black

codes" which either outlawed gun ownership by blacks entirely, or imposed permit systems for them, and permitted the confiscation of firearms owned by blacks. When the Civil Rights Act of 1866 was debated members both of the Senate and the House referred to the disarmament of blacks as a major consideration. [54] Senator Trumbull cited provisions outlawing ownership of arms by blacks as among those which the Civil Rights Act would prevent. [55] Senator Sulsbury complained on the other hand that if the act were to be passed it would prevent his own state from enforcing a law banning gun ownership by individual free blacks. [56] Similar arguments were advanced during the debates over the "anti-KKK act"; its sponsor at one point explained that a section making it a federal crime to deprive a person of "arms or weapons he may have in his house or possession for the defense of his person, family, or property" was "intended to enforce the well-known constitutional provisions guaranteeing the right in the citizen 'keep and bear arms'." [57] Likewise, in the debates over the Fourteenth Amendment Congress frequently referred to the Second Amendment as one of the rights which it intended to guarantee against state action. [58]

Following adoption of the Fourteenth Amendment, however, the Supreme Court held that that Amendment's prohibition against states depriving any persons of their federal "privileges and immunities" was to be given a narrow construction. In particular, the "privileges and immunities" under the Constitution would refer only to those rights which were not felt to exist as a process of natural right, but which were created solely by the Constitution. These might refer to rights such as voting in federal elections and of interstate travel, which would clearly not exist except by virtue of the existence of a federal government and which could not be said to be "natural rights". [59] This paradoxically meant that the rights which most persons would accept as the most important — those flowing from concepts of natural justice — were devalued

at the expense of more technical rights. Thus when individuals were charged with having deprived black citizens of their right to freedom of assembly and to keep and bear arms, by violently breaking up a peaceable assembly of black citizens, the Supreme Court in United States v. Cruikshank [60] held that no indictment could be properly brought since the right "of bearing arms for a lawful purpose" is "not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence." Nor, in the view of the Court, was the right to peacefully assemble a right protected by the Fourteenth Amendment: "The right of the people peaceably to assemble for lawful purposes existed long before the adoption of the Constitution of the United States. In fact, it is and has always been one of the attributes of citizenship under a free government. . . .It was not, therefore, a right granted to the people by the Constitution." Thus the very importance of the rights protected by the First and Second Amendment was used as the basis for the argument that they did not apply to the states under the Fourteenth Amendment. In later opinions, chiefly Presser v. Illinois [61] and Miller v. Texas [62] the Supreme Court adhered to the view. Cruikshank has clearly been superseded by twentieth century opinions which hold that portions of the Bill of Rights — and in particular the right to assembly with which Cruikshank dealt in addition to the Second Amendment — are binding upon the state governments. Given the legislative history of the Civil Rights Acts and the Fourteenth Amendment, and the more expanded views of incorporation which have become accepted in our own century, it is clear that the right to keep and bear arms was meant to be and should be protected under the civil rights statutes and the Fourteenth Amendment against infringement by officials acting under color of state law.

Within our own century, the only occasion upon which the Second Amendment has reached the Supreme Court came in United States v. Miller. [63] There, a prosecution for carrying a sawed off shotgun was dismissed before trial on Second

Amendment grounds. In doing so, the court took no evidence as to the nature of the firearm or indeed any other factual matter. The Supreme Court reversed on procedural grounds, holding that the trial court could not take judicial notice of the relationship between a firearm and the Second Amendment, but must receive some manner of evidence. It did not formulate a test nor state precisely what relationship might be required. The court's statement that the amendment was adopted "to assure the continuation and render possible the effectiveness of such [militia] forces" and "must be interpreted and applied with that end in view", when combined with the court's statement that all constitutional sources "show plainly enough that the militia comprised all males physically capable of acting in concert for the common defense.... these men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time," [64] suggests that at the very least private ownership by a person capable of self defense and using an ordinary privately owned firearm must be protected by the Second Amendment. What the Court did not do in Miller is even more striking: It did not suggest that the lower court take evidence on whether Miller belonged to the National Guard or a similar group. The hearing was to be on the nature of the firearm, not on the nature of its use; nor is there a single suggestion that National Guard status is relevant to the case.

The Second Amendment right to keep and bear arms therefore, is a right of the individual citizen to privately possess and carry in a peaceful manner firearms and similar arms. Such an "individual rights" interpretation is in full accord with the history of the right to keep and bear arms, as previously discussed. It is moreover in accord with contemporaneous statements and formulations of the right by such founders of this nation as Thomas Jefferson and Samuel Adams, and accurately reflects the majority of the proposals which led up to the Bill of Rights itself. A number of state constitutions, adopted prior to or contemporaneously with the federal

Constitution and Bill of Rights, similarly provided for a right of the people to keep and bear arms. If in fact this language creates a right protecting the states only, there might be a reason for it to be inserted in the federal Constitution but no reason for it to be inserted in state constitutions. State bills of rights necessarily protect only against action by the state, and by definition a state cannot infringe its own rights; to attempt to protect a right belonging to the state by inserting it in a limitation of the state's own powers would create an absurdity. The fact that the contemporaries of the framers did insert these words into several state constitutions would indicate clearly that they viewed the right as belonging to the individual citizen, thereby making it a right which could be infringed either by state or federal government and which must be protected against infringement by both.

Finally, the individual rights interpretation gives full meaning to the words chosen by the first Congress to reflect the right to keep and bear arms. The framers of the Bill of Rights consistently used the words "right of the people" to reflect individual rights — as when these words were used to recognize the "right of the people" to peaceably assemble, and the "right of the people" against unreasonable searches and seizures. They distinguished between the rights of the people and of the state in the Tenth Amendment. As discussed earlier, the "militia" itself referred to a concept of a universally armed people, not to any specifically organized unit. When the framers referred to the equivalent of our National Guard, they uniformly used the term "select militia" and distinguished this from "militia". Indeed, the debates over the Constitution constantly referred to the organized militia units as a threat to freedom comparable to that of a standing army, and stressed that such organized units did not constituted, and indeed were philosophically opposed to, the concept of a militia.

That the National Guard is not the "Militia" referred to

in the second amendment is even clearer today. Congress has organized the National Guard under its power to "raise and support armies" and not its power to "Provide for the organizing, arming and disciplining the Militia". [65] This Congress chose to do in the interests of organizing reserve military units which were not limited in deployment by the strictures of our power over the constitutional militia, which can be called forth only "to execute the laws of the Union, suppress insurrections and repel invasions." The modern National Guard was specifically intended to avoid status as the constitutional militia, a distinction recognized by 10 U.S.C. Sec. 311(a).

The conclusion is thus inescapable that the history, concept, and wording of the second amendment to the Constitution of the United States, as well as its interpretation by every major commentator and court in the first half century after its ratification, indicates that what is protected is an individual right of a private citizen to own and carry firearms in a peaceful manner.

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APPENDIX
Case Law

The United States Supreme Court has only three times commented upon the meaning of the second amendment to our constitution. The first comment, in Dred Scott, indicated strongly that the right to keep and bear arms was an individual right; the Court noted that, were it to hold blacks to be entitled to equality of citizenship, they would be entitled to keep and carry arms wherever they went. The second, in Miller, indicated that a court cannot take judicial notice that a short-barrelled shotgun is covered by the second amendment — but the Court did not indicate that National Guard status is in any way required for protection by that amendment, and indeed defined "militia" to include all citizens able to bear arms. The third, a footnote in Lewis v. United States, indicated only that "these legislative restrictions on the use of firearms" — a ban on possession by felons — were permissable [sic]. But since felons may constitutionally be deprived of many of the rights of citizens, including that of voting, this dicta reveals little. These three comments constitute all significant explanations of the scope of the second amendment advanced by our Supreme Court. The case of Adam v. Williams has been cited as contrary to the principle that the second amendment is an individual right. In fact, that reading of the opinion comes only in Justice Douglas's dissent from the majority ruling of the Court.

The appendix which follows represents a listing of twenty-one American decisions, spanning the period from 1822 to 1981, which have analyzed right to keep and bear arms provisions in the light of statutes ranging from complete bans on handgun sales to bans on carrying of weapons to regulation of carrying by permit systems. Those decisions not only explained the nature of such a right, but also struck down legislative restrictions as violative of it, are designated by asterisks.

20TH CENTURY CASES

1. State v. Blocker, 291 Or. 255, — — — P. 2d — — — (1981).

> "The statue is written as a total proscription of the mere possession of certain weapons, and that mere possession, insofar as a billy is concerned, is constitutionally protected."
>
> "In these circumstances, we conclude that it is proper for us to consider defendant's 'overbreadth' attack to mean that the statute swept so broadly as to infringe rights that it could not reach, which in the setting means the right to possess arms guaranteed by sec 27."

2. State v. Kessler, 289 Or. 359, 614 P. 2d 94, at 95, at 98 (1980).

> "We are not unmindful that there is current controversy over the wisdom of a right to bear arms, and that the original motivations for such a provision might not seem compelling if debated as a new issue. Our task, however, in construing a constitutional provision is to respect the principles given the status of constitutional guarantees and limitations by the drafters; it is not to abandon these principles when this fits the needs of the moment."
>
> "Therefore, the term 'arms' as used by the drafters of the constitutions probably was intended to include those weapons used by settlers for both personal and military defense. The term 'arms' was not limited to firearms, but included several handcarried weapons commonly used for defense. The term 'arms' would not have included cannon or other heavy ordnance not kept by militiamen or private citizens."

3. Motley v. Kellogg, 409 N.E. 2d 1207, at 1210 (Ind. App. 1980) (motion to transfer denied 1-27-1981).

> "[N]ot making applications available at the chief's office effectively denied members of the community the opportunity to obtain a gun permit and bear arms for their self-defense."

4. Schubert v. DeBard, 398 N.E. 2d 1339, at 1341 (Ind. App. 1980) (motion to transfer denied 8-28-1980).

> "We think it clear that our constitution provides our citizenry the right to bear arms for their self-defense."

5. Taylor v. McNeal, 523 S.W. 2d 148, at 150 (Mo. App. 1975)

> "The pistols in question are not contraband. * * * Under Art. I, sec 23, Mo. Const. 1945, V.A.M.S., every citizen has the right to keep and bear arms in defense of his home, person, and property, with the limitation that this section shall not justify the wearing of concealed arms."

6. City of Lakewood v. Pillow, 180 Colo 20, 501 P. 2d 744, at 745 (en banc 1972).

> "As an example, we note that this ordinance would prohibit gunsmiths, pawnbrokers and sporting goods stores from carrying on a substantial part of their business. Also, the ordinance appears to prohibit individuals from transporting guns to and from such places of business. Furthermore, it makes it unlawful for a person to possess a firearm in a vehicle or in a place of business for the purpose of self-defense. Several of these activities are constitutionally protected. Colo. Const. art. II, sec 13."

7. City of Las Vegas v. Moberg, 82 N.M. 626, 485 P. 2d 737, at 738 (N.M. App. 1971).

"It is our opinion that an ordinance may not deny the people the constitutionally guaranteed right to bear arms, and to that extent the ordinance under consideration is void."

8. State v. Nickerson, 126 Mt. 157, 247 P. 2d 188, at 192 (1952).

"The law of this jurisdiction accords to the defendant the right to keep and bear arms and to use same in defense of his own home, his person and property."

9. People v. Liss, 406 Ill. 419, 94 N.E. 2d 320, at 323 (1950).

"The second amendment to the constitution of the United States provides the right of the people to keep and bear arms shall not be infringed. This of course does not prevent the enactment of a law against carrying concealed weapons, but it does indicate it should be kept in mind, in the construction of a statue of such character, that it is aimed at persons of criminal instincts, and for the prevention of crime, and not against use in the protection of person or property."

10. People v. Nakamura, 99 Colo. 262, at 264, 62 P. 2d 246 (en banc 1936).

"It is equally clear that the act wholly disarms aliens for all purposes. The state . . . cannot disarm any class of persons or deprive them of the right guaranteed under section 13, article II of the Constitution, to bear arms in defense of home, person and property. The guaranty thus extended is meaningless if any person is denied the right to possess arms for such protection."

11. Glasscock v. City of Chattanooga, 157 Tenn. 518, at

520, 11 S.W. 2d 678 (1928).

> "There is no qualification of the prohibition against the carrying of a pistol in the city ordinance before us but it is made unlawful 'to carry on or about the person any pistol,' that is, any sort of pistol in any sort of manner. *** [W]e must accordingly hold the provision of this ordinance as to the carrying of a pistol invalid."

12. People v. Zerillo, 219 Mich. 635, 189 N.W. 927, at 928 (1922).

> "The provision in the Constitution granting the right to all persons to bear arms is a limitation upon the right of the Legislature to enact any law to the contrary. The exercise of a right guaranteed by the Constitution cannot be made subject to the will of the sheriff."

13. State v. Kerner, 181 N.C. 574, 107 S.E. 222, at 224 (1921).

> "We are of the opinion, however, that 'pistol' ex vi termini is properly included within the word 'arms,' and that the right to bear such arms cannot be infringed. The historical use of pistols as 'arms' of offense and defense is beyond controversy."
> "The maintenance of the right to bear arms is a most essential one to every free people and should not be whittled down by technical constructions."

14. State v. Rosenthal, 75 VT. 295, 55 A. 610, at 611 (1903).

> "The people of the state have a right to bear arms for the defense of themselves and the state. *** The result is that Ordinance No. 10, so far as it relates to the carrying of a pistol, is inconsistent with and repugnant to the Constitution and the laws of the state, and it is therefore to that extent, void."

15. In re Brickey, 8 Ida. 597, at 598-99, 70 p. 609 (1902).

> "The second amendment to the federal constitution is in the following language: 'A well-regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed.' The language of section 11, article I of the constitution of Idaho, is as follows: 'The people have the right to bear arms for their security and defense, but the legislature shall regulate the exercise of this right by law.' Under these constitutional provisions, the legislature has no power to prohibit a citizen from bearing arms in any portion of the state of Idaho, whether within or without the corporate limits of cities, towns, and villages."

19TH CENTURY CASES

16. Wilson v. State, 33 Ark. 557, at 560, 34 Am. Rep. 52, at 54 (1878).

> "If cowardly and dishonorable men sometimes shoot unarmed men with army pistols or guns, the evil must be prevented by the penitentiary and gallows, and not by a general deprivation of constitutional privilege."

17. Jennings v. State, 5 Tex. Crim. App. 298, at 300-01 (1878).

> "We believe that portion of the act which provides that, in case of conviction, the defendant shall forfeit to the county the weapon of weapons so found on or about his person is not within the scope of legislative authority. * * * One of his most sacred rights is that of having arms for his own defence and that of the State. This right is one of the surest safeguards of liberty and self-preservation."

18. Andrews v. State, 50 Tenn. 165, 8 Am. Rep. 8, at 17 (1871).

> "The passage from Story shows clearly that this right was intended, as we have maintained in this opinion, and was guaranteed to and to be exercised and enjoyed by the citizen as such, and not by him as a soldier, or in defense solely of his political rights."

19. Nunn v. State, 1 Ga. (1 Kel.) 243, at 251 (1846).

> "The right of the people to bear arms shall not be infringed." The right of the whole people, old and young, men, women and boys, and not militia only, to keep and bear arms of every description, and not such merely as are used by the militia, shall not be infringed, curtailed, or broken in upon, in the smallest degree; and all this for the important end to be attained: the rearing up and qualifying a well-regulated militia, so vitally necessary to the security of a free State."

20. Simpson v. State, 13 Tenn. 356, at 359-60 (1833).

> "But suppose it to be assumed on any ground, that our ancestors adopted and brought over with them this English statute, [the statute of Northampton,] or portion of the common law, our constitution has completely abrogated it; it says, 'that the freemen of this State have a right to keep and bear arms for their common defence.' Article II, sec. 26. * * * By this clause of the constitution, an express power is given and secured to all the free citizens of the State to keep and bear arms for their defence, without any qualification whatever as to their kind or nature; and it is conceived, that it would be going much too far, to impair by construction or abridgement a constitutional privilege, which is so declared; neither, after so solemn an instrument hath said the people may carry arms, can we be permitted to impute to the

> acts thus licensed, such a necessarily consequent operation as terror to the people to be incurred thereby; we must attribute to the framers of it, the absence of such a view."

21. Bliss v. Commonwealth, 12 Ky. (2 Litt.) 90, at 92, and 93, 13 Am. Dec. 251 (1822).

> "For, in principle, there is no difference between a law prohibiting the wearing concealed arms, and a law forbidding the wearing such as are exposed; and if the former be unconstitutional, the latter must be so likewise."

> "But it should not be forgotten, that it is not only a part of the right that is secured by the constitution; it is the right entire and complete, as it existed at the adoption of the constitution; and if any portion of that right be impaired, immaterial how small the part may be, and immaterial the order of time at which it be done, it is equally forbidden by the constitution."

The following represents a list of twelve scholarly articles which have dealt with the subject of the right to keep and bear arms as reflected in the second amendment to the Constitution of the United States. The scholars who have undertaken this research range from professors of law, history and philosophy to a United States Senator. All have concluded that the second amendment is an individual right protecting American citizens in their peaceful use of firearms.

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ENFORCEMENT OF FEDERAL FIREARMS LAWS FROM THE PERSPECTIVE OF THE SECOND AMENDMENT

Federal involvement in firearms possession and transfer was not significant prior to 1934, when the National Firearms Act was adopted. The National Firearms Act as adopted covered only fully automatic weapons (machine guns and submachine guns) and rifles and shotguns whose barrel length or overall length fell below certain limits. Since the Act was adopted under the revenue power, sale of these firearms was not made subject to a ban or permit system. Instead, each transfer was made subject to a $200 excise tax, which must be paid prior to transfer; the identification of the parties to the transfer indirectly accomplished a registration purpose.

The 1934 Act was followed by the Federal Firearms Act of 1938, which placed some limitations upon sale of ordinary firearms. Persons engaged in the business of selling those firearms in interstate commerce were required to obtain a Federal Firearms License, at an annual cost of $1, and to maintain records of the name and address of persons to whom they sold firearms. Sales to persons convicted of violent felonies were prohibited, as were interstate shipments to persons who lacked the permits required by the law of their state.

Thirty years after adoption of the Federal Firearms Act, the Gun Control Act of 1968 worked a major revision of federal law. The Gun Control Act was actually a composite of two statutes. The first of these, adopted as portions of the Omnibus Crime and Safe Streets Act, imposed limitations upon imported firearms, expanded the requirement of dealer licensing to cover anyone "engaged in the business of dealing" in firearms, whether in interstate or local commerce, and expanded the recordkeeping obligations for dealers. It also imposed a variety of direct limitations upon sales of handguns. No transfers were to be permitted between residents of different states (unless the

recipient was a federally licensed dealer), even where the transfer was by gift rather than sale and even where the recipient was subject to no state law which could have been evaded. The category of persons to whom dealers could not sell was expanded to cover persons convicted of any felony (other than certain business-related felonies such as antitrust violations), persons subject to a mental commitment order or finding of mental incompetence, persons who were users of marijuana and other drugs, and a number of other categories. Another title of the Act defined persons who were banned from possessing firearms. Paradoxically, these classes were not identical with the list of classes prohibited from purchasing or receiving firearms.

The Omnibus Crime and Safe Streets Act was passed on June 5, 1968, and set to take effect in December of that year. Barely two weeks after its passage, Senator Robert F. Kennedy was assassinated while campaigning for the presidency. Less that a week after his death, the second bill which would form part of the Gun Control Act of 1968 was introduced in the House. It was reported out of Judiciary ten days later, out of Rules Committee two weeks after that, and was on the floor barely a month after its introduction. the second bill worked a variety of changes upon the original Gun Control Act. Most significantly, it extended to rifles and shotguns the controls which had been imposed solely on handguns, extended the class of persons prohibited from possessing firearms to include those who were users of marijuana and certain other drugs, expanded judicial review of dealer license revocations by mandating a de novo hearing once an appeal was taken, and permitted interstate sales of rifles and shotguns only where the parties resided in contiguous states, both of which had enacted legislation permitting such sales. Similar legislation was passed by the Senate and a conference of the Houses produced a bill which was essentially a modification of the House statute. This became law before the Omnibus Crime Control and Safe Streets Act, and was therefore set for the same effective date.

Enforcement of the 1968 Act was delegated to the Department of the Treasury, which had been responsible for enforcing the earlier gun legislation. This responsibility was in turn given to the Alcohol and Tobacco Tax Division of the Internal Revenue Service. This division had traditionally devoted itself to the pursuit of illegal producers of alcohol; at the time of enactment of the Gun Control Act, only 8.3 percent of its arrests were for firearms violations. Following enactment of the Gun Control Act the Alcohol and Tobacco Tax Division was retitled the Alcohol, Tobacco and Firearms Division of the IRS. By July, 1972 it had nearly doubled in size and became a complete Treasury bureau under the name of Bureau of Alcohol, Tobacco and Firearms.

The mid-1970's saw rapid increases in sugar prices, and these in turn drove the bulk of the "moonshiners" out of business. Over 15,000 illegal distilleries had been raided in 1956; but by 1976 this had fallen to a mere 609. The BATF thus began to devote the bulk of its efforts to the area of firearms law enforcement.

Complaint regarding the techniques used by the Bureau in an effort to generate firearms cases led to hearings before the Subcommittee on Treasury, Post Office, and General Appropriations of the Senate Appropriations Committee in July 1979 and April 1980, and before the Subcommittee on the Constitution of the Senate Judiciary Committee in October 1980. At these hearings evidence was received from various citizens who had been charged by BATF, from experts who had studied the BATF, and from officials of the Bureau itself.

Based upon these hearings, it is apparent that enforcement tactics made possible by current federal firearms laws are constitutionally, legally, and practically reprehensible. Although Congress adopted the Gun Control Act with the primary object of limiting access of felons and high-risk groups to firearms, the overbreadth of the law has led to neglect of precisely this area of enforcement. For example the

Subcommittee on the Constitution received correspondence from two members of the Illinois Judiciary, dated in 1980, indicating that they had been totally unable to persuade BATF to accept cases against felons who were in possession of firearms including sawed-off shotguns. The Bureau's own figures demonstrate that in recent years the percentage of its arrests devoted to felons in possession and persons knowingly selling to them have dropped from 14 percent down to 10 percent of their firearms cases. To be sure, genuine criminals are sometimes prosecuted under other sections of the law. Yet, subsequent to these hearings, BATF stated that 55 percent of its gun law prosecutions overall involve persons with no record of a felony conviction, and a third involve citizens with no prior police contact at all.

The Subcommittee received evidence that the BATF has primarily devoted its firearms enforcement efforts to the apprehension, upon technical malum prohibitum charges, of individuals who lack all criminal intent and knowledge. Agents anxious to generate an impressive arrest and gun confiscation quota have repeatedly enticed gun collectors into making a small number of sales — often as few as four — from their personal collections. Although each of the sales was completely legal under state and federal law, the agents then charged the collector with having "engaged in the business" of dealing in guns without the required license. Since existing law permits a felony conviction upon these charges even where the individual has no criminal knowledge or intent numerous collectors have been ruined by a felony record carrying a potential sentence of five years in federal prison. Even in cases where the collectors secured acquittal, or grand juries failed to indict, or prosecutors refused to file criminal charges, agents of the Bureau have generally confiscated the entire collection of the potential defendant upon the ground that he intended to use it in that violation of the law. In several cases, the agents have refused to return the collection even after acquittal by jury.

The defendant, under existing law is not entitled to an

award of attorney's fees, therefore, should he secure return of his collection, an individual who has already spent thousands of dollars establishing his innocence of the criminal charges is required to spend thousands more to civilly prove his innocence of the same acts, without hope of securing any redress. This of course, has given the enforcing agency enormous bargaining power in refusing to return confiscated firearms. Evidence received by the Subcommittee related the confiscation of a shotgun valued at $7,000. Even the Bureau's own valuations indicate that the value of firearms confiscated by their agents is over twice the value which the Bureau has claimed is typical of "street guns" used in crime. In recent months, the average value has increased rather than decreased, indicating that the reforms announced by the Bureau have not in fact redirected their agents away from collector's items and toward guns used in crime.

The Subcommittee on the Constitution has also obtained evidence of a variety of other misdirected conduct by agents and supervisors of the Bureau. In several cases, the Bureau has sought conviction for supposed technical violations based upon policies and interpretations of law which the Bureau had not published in the Federal Register, as required by 5 U.S.C. Sec 552. For instance, beginning in 1975, Bureau officials apparently reached a judgment that a dealer who sells to a legitimate purchaser may nonetheless be subject to prosecution or license revocation if he knows that that individual intends to transfer the firearm to a nonresident or other unqualified purchaser. This position was never published in the Federal Register and is indeed contrary to indications which Bureau officials had given Congress, that such sales were not in violation of existing law. Moreover, BATF had informed dealers that an adult purchaser could legally buy for a minor, barred by his age from purchasing a gun on his own. BATF made no effort to suggest that this was applicable only where the barrier was one of age. Rather than informing the dealers of this distinction, Bureau agents set out to produce mass arrests upon these "straw man" sale charges, sending out undercover agents to entice dealers into transfers of this type. The first

major use of these charges, in South Carolina in 1975, led to 37 dealers being driven from business, many convicted on felony charges. When one of the judges informed Bureau officials that he felt dealers had not been fairly treated and given information of the policies they were expected to follow, and refused to permit further prosecutions until they were informed, Bureau officials were careful to inform only the dealers in that one state and even then complained in internal memoranda that this was interfering with the creation of the cases. When BATF was later requested to place a warning to dealers on the front of the Form 4473, which each dealer executes when a sale is made, it instead chose to place the warning in fine print upon the back of the form, thus further concealing it from the dealer's sight.

The Constitution Subcommittee also received evidence that the Bureau has formulated a requirement, of which dealers were not informed that requires a dealer to keep official records of sales even from his private collection. BATF has gone farther than merely failing to publish this requirement. At one point, even as it was prosecuting a dealer on the charge (admitting that he had no criminal intent), the Director of the Bureau wrote Senator S. I. Hayakawa to indicate that there was no such legal requirement and it was completely lawful for a dealer to sell from his collection without recording it. Since that date, the Director of the Bureau has stated that that is not the Bureau's position and that such sales are completely illegal; after making that statement, however, he was quoted in an interview for a magazine read primarily by licensed firearms dealers as stating that such sales were in fact legal and permitted by the Bureau. In these and similar areas, the Bureau has violated not only the dictates of common sense, but of 5 U.S.C. Sec 552, which was intended to prevent "secret lawmaking" by administrative bodies.

These practices, amply documented in hearings before this Subcommittee, leave little doubt that the Bureau has disregarded rights guaranteed by the constitution and laws of the United States.

It has trampled upon the second amendment by chilling exercise of the right to keep and bear arms by law-abiding citizens.

It has offended the fourth amendment by unreasonably searching and seizing private property.

It has ignored the Fifth Amendment by taking private property without just compensation and by entrapping honest citizens without regard for their right to due process of law.

The rebuttal presented to the Subcommittee by the Bureau was utterly unconvincing. Richard Davis, speaking on behalf of the Treasury Department, asserted vaguely that the Bureau's priorities were aimed at prosecuting willful violators, particularly felons illegally in possession, and at confiscating only guns actually likely to be used in crime. He also asserted that the Bureau has recently made great strides toward achieving these priorities. No documentation was offered for either of these assertions. In hearings before BATF's Appropriations Subcommittee, however, expert evidence was submitted establishing that approximately 75 percent of BATF gun prosecutions were aimed at ordinary citizens who had neither criminal intent nor knowledge, but were enticed by agents into unknowing technical violations. (In one case, in fact, the individual was being prosecuted for an act which the Bureau's acting director had stated was perfectly lawful.) In those hearings, moreover, BATF conceded that in fact (1) only 9.8 percent of their firearm arrests were brought on felons in illicit possession charges; (2) the average value of guns seized was $116, whereas BATF had claimed that "crime guns" were priced at less than half that figure; (3) in the months following the announcement of their new "priorities", the percentage of gun prosecutions aimed at felons had in fact fallen by a third, and the value of confiscated guns had risen. All this indicates that the Bureau's vague claims, both of focus upon gun-using criminals and of recent reforms, are empty words.

In light of this evidence, reform of federal firearm laws is necessary to protect the most vital rights of American citizens. Such legislation is embodied in S. 1030. That legislation would require proof of a willful violation as an element of a federal gun prosecution, forcing enforcing agencies to ignore the easier technical cases and aim solely at the intentional breaches. It would restrict confiscation of firearms to those actually used in an offense, and require their return should the owner be acquitted of the charges. By providing for award of attorney's fees in confiscation cases, or in other cases if the judge finds charges were brought without just basis or from improper motives, this proposal would be largely self-enforcing. S. 1030 would enhance vital protection of constitutional and civil liberties of those Americans who choose to exercise their Second Amendment right to keep and bear arms.

[Other sections omitted.]

(3)

No. 03-1707

Supreme Court, U.S.
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In The

Supreme Court of the United States

RUSSELL ALLEN NORDYKE, *et al.*,

Petitioners,

v.

MARY V. KING, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTIONS PRESENTED

1. Should this Court reverse its precedents holding that the Second Amendment constrains only the actions of Congress, in the context of an order of the United States Court of Appeals for the Ninth Circuit affirming denial of a preliminary injunction, where that order does not conflict with these precedents or with the decisions of any other United States court of appeals on the same federal question?

2. Should this Court reverse its decisions on the scope of the right protected by the Second Amendment in the context of a challenge to a legislative decision by a County, a legal subdivision of the State of California, to prohibit possession of firearms on certain property it owns such as parks, historic sites and the fairgrounds?

3. Does a County ordinance prohibiting possession of firearms on County-owned property, including its fairgrounds, on its face, abridge First Amendment rights of trade show operators who choose not to patronize that venue after enactment of that ordinance?

LIST OF PARTIES

Petitioners:

Russell Allen Nordyke and Sallie Ann Nordyke, dba TS Trade Shows.[1]

Respondents:

Mary V. King, Gail Steele, Wilma Chan, Keith Carson, Scott Haggerty,

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[1] The plaintiffs in the original complaint were Russell Allen Nordyke and Sallie Ann Nordyke, dba TS Trade Shows ("Nordykes"). Excerpts of Record ("R"), Tab ("T") 1, page 1. Seven days after the trial court issued the order denying the preliminary injunction, the Nordykes amended their complaint, adding allegations and new plaintiffs. R, T16. On appeal, Petitioners "bootstrapped" the amended complaint into the appeal by captioning the appellate pleadings with the caption from the amended complaint and citing to the amended complaint. R, T1 at 1; T16 at 1. Respondents moved the Ninth Circuit Court of Appeals to strike the additional plaintiffs who were not parties to the action when the District Court entered the order appealed from, and also moved to strike references to the amended complaint. Respondents' Appendix ("Resp. App.") 9. The Ninth Circuit never ruled on that motion and never addressed the issue. However, in its opinion affirming the order denying the preliminary injunction, the Ninth Circuit refers only to the Nordykes. Pet. App. 1. In the proceedings before the California Supreme Court on the question certified by the Ninth Circuit, the County also moved to strike the same matter. Resp. App. 14. That Court also never ruled on the motion. In the opinion, the California Supreme Court refers to the exhibitors and patrons as "the remaining plaintiffs" (Pet. App. 84) but appears to treat the Nordykes as the only parties to the interlocutory appeal. Pet. App. 83, 84, 85. Accordingly, it is Respondents' position that none of the persons or entities captioned by Petitioners as Petitioners except the Nordykes themselves are proper parties to any of the proceedings pertaining to appeal from the order denying the preliminary injunction, including this Petition, and that this Court has jurisdiction only over the Nordykes.

LIST OF PARTIES – Continued

The County of Alameda, and the County of Alameda Board of Supervisors.[2]

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[2] Petitioners named in the original complaint The County of Alameda and the Alameda County Board of Supervisors and its individual Board Members, Mary V. King, Gail Steele, Wilma Chan, Keith Carson, Scott Haggerty, in their personal as well as official capacities. Respondents have consistently taken the position that there is no basis for the Board of Supervisors or its members to be personally named because they are absolutely immune from personal liability for their legislative acts and are also protected by the doctrine of qualified immunity. Respondents preserved these objections by filing with the District Court on October 7, 1999, a Notice of Motion and Motion by Defendants to Dismiss the Verified Complaint for Damages, Injunction and Declaratory Judgment, or In the Alternative to Abstain; Memorandum of Points and Authorities in Support Thereof. The hearing on this motion is stayed pending the underlying appeal. Accordingly, without waiving the objections set forth in the motion, this Brief in Opposition refers to Mary V. King, Gail Steele, Wilma Chan, Keith Carson, Scott Haggerty, The County of Alameda, and the County of Alameda Board of Supervisors collectively as "Respondents."

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STATEMENT OF THE CASE

After a failed attempt to obtain reversal of an order denying a preliminary injunction, Russell Allen Nordyke and Sallie Ann Nordyke dba TS Trade Shows[1] ("Petitioners") invite this Court to revisit its holdings on the incorporation doctrine, the Second Amendment, and separation of powers, in the context of their facial challenge to a County ordinance prohibiting firearms possession on one limited category of *County-owned* property. ALAMEDA COUNTY, CA GEN. ORD. CODE, Ch. 9.12, § 9.12.120. subd. (C) ("Ordinance"), Pet. App. 94-96. The challenged Ordinance regulates venues *owned* by the County of Alameda, such as parks, historic sites, and the fairgrounds, and was enacted after a mass shooting at one of the regulated venues. Pet. App. 94-96.[2]

Petitioners' Statement of the Case contains numerous misstatements of the facts and the law that are corrected below. However, the Statement also obfuscates three essential facts that merit this Court's immediate consideration. First, Petitioners' Second Amendment claim – which Petitioners never pleaded and never presented to the trial court at all – is presented to this Court in a factual vacuum, and was so presented to the Ninth Circuit Court of Appeals. As discussed below, this Court has a long and considered practice not to decide any constitutional question except with reference to the particular facts to which it is to be applied. The Court would be required to relinquish that practice here. The Petition, Judge Gould's separate concurrence, and the opinions dissenting from denial of rehearing en banc, are all devoid of analysis regarding why or how judicial recognition of an "individual right to bear arms" would have any bearing on this trade

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[1] *See* List of Parties, n.1, *supra*.

[2] The Ordinance also prohibits possession of ammunition on County-owned property. Pet. App. 94-95. However, that aspect of the Ordinance has not been a subject of Petitioners' challenge.

show operator's facial challenge to a garden variety prohibition of firearms on certain publicly-owned property.

Second, as noted above, the challenged Ordinance regulates only a limited category of the *County's own property*. It does not regulate throughout the unincorporated territory, a misimpression Petitioners have successfully conveyed to a number of the judges dissenting from denial of rehearing en banc.[3] The Ordinance applies only to property **owned** by the County, and excepts local public buildings. Thus, the property regulated consists principally of **open space venues**, such as county-owned parks, recreation areas and historic sites, and the County fairgrounds. Pet. App. 94-96.

Third, as set forth on the face of the Ordinance, it was enacted to **promote the public health and safety after a mass shooting on the County-owned fairgrounds** and in response to the high number of gun-related homicides and injuries in the County, all detailed in the findings. Pet. App. 94. The Petition attempts to obscure these legislative findings, referencing them only as "findings about the abstract evils flowing from guns." Petition ("Pet.") 27.

In short, by obfuscating where and why the Ordinance prohibits firearms possession, Petitioners have succeeded in sparking an academic discussion by a few Ninth Circuit

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[3] Some justices dissenting from denial of the petition for rehearing en banc apparently understood the Ordinance to apply throughout the unincorporated territory. *See Nordyke v. King*, 364 F.3d 1025, 1026, (9th Cir. 2004); Pet. App. 24, 26. However, the Ordinance applies only to property the County owns in fee or leases, wherever located; it does not apply generally to the unincorporated territory, most of which is owned or leased by private parties or public entities other than the County, and it does not apply to local public buildings owned or leased by the County. Pet. App. 94-96. The County owns no housing, therefore the Ordinance also does not apply to any residential property. By statute, the existence of a separate corporate body, the Housing Authority of the County of Alameda, precludes ownership of public housing by Alameda County. *See* Cal. Health and Safety Code §§ 34240, 34201(c), 34401(d), 34315(b), (e), (f). at Resp. App. 1-5.

judges who are anxious to debate the nature of the right protected by the Second Amendment. Petitioners now invite the Court to join in that debate but fail to show this Court why it is *necessary* to adjudicate that issue here.

More specifically, the actual facts of the case are as follows. Petitioners seek review from the order of the Ninth Circuit Court of Appeals affirming the denial of their motion for a preliminary injunction. Their underlying challenge is one to the facial validity of the Ordinance, which prohibits firearms possession on property owned or leased by the County. Pet. App. 94-96. Subject to certain exceptions, state law prohibits firearms possession in "local public buildings." *See* Cal. Pen. Code § 171b; Resp. App. 5-8. State law does not prohibit firearms possession on other County-owned property. *Id.* The Ordinance excepts local public buildings. Pet. App. 94-96. As a result, the principal venues subject to the Ordinance are open space venues, where crowds may gather, and where it is difficult to supervise access and activities.

Although the County exercises general police powers throughout the unincorporated territory,[4] most of which is owned or leased by private and public owners other than the County, the State has specifically charged the County with the duty of managing the County's own property in

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[4] Under California Government Code Section 23002, the County is a legal subdivision of the State. *See* Cal. Gov. Code § 23002 ("The several existing counties of the State and such other counties as are hereafter organized are legal subdivisions of the State."). Under the California Constitution, its police powers are as broad as those of the State except regarding those subjects over which the State has chosen to assert exclusive authority. *See* CAL. CONST. art. 11, § 7 ("A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws."); *see also Birkenfeld v. City of Berkeley*, 17 Cal.3d 129, 140, 130 Cal.Rptr. 465 (Cal. 1976).

the interests of its inhabitants. Cal. Gov. Code § 23004(d).[5] In the proceedings in this case, the California Supreme Court has held that under Cal. Gov. Code section 23004(d) "a county is given substantial authority to manage its property, including the most fundamental decision as to how that property will be used. . . ." *Nordyke v. King*, 27 Cal.4th 875, 882, 118 Cal.Rptr.2d 761 (Cal. 2002) (citing to *Great Western Shows, Inc. v. County of Los Angeles*, 27 Cal.4th 853, 118 Cal.Rptr.2d 746 (Cal. 2002)); Pet. App. 86.

The Ordinance was enacted after a multiple shooting on the County-owned fairgrounds, during the County fair. Twelve people, most under the age of 21 and the youngest of whom was 8 years old, were injured in this incident. Excerpts of Record ("R"), Tab ("T") 9, 2, ¶ 4. Emergency response teams, medical helicopters, and 157 law enforcement officers responded to the incident. R, T9, 3, ¶ 5. The alleged perpetrator was arrested in possession of a semi-automatic handgun and an extra ammunition clip and was charged. R, T9, 3, ¶ 6. The incident gave rise to nineteen tort claims, eleven of which could not be resolved and culminated in eleven liability lawsuits against the County. R, T13, 13-74. This incident, the high level of gun homicides and injuries in the County, and the fact that firearms rank as the leading cause of death for young people ages 15 through 24 in Alameda County, were among the findings made by the County Board of Supervisors in adopting the Ordinance. Ordinance, subd. (A); Pet. App. 94.

The Ordinance contains a few exceptions, including for persons such as peace officers, concealed carry permit holders, persons lawfully using the County target range, and participants in film, dance, theatre productions or events when the participant uses the firearm as part of the production or event and the firearm is secured when

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[5] Gov. Code Section 23004(d) provides that a county may "[m]anage, sell, lease, or otherwise dispose of its property as the interest of its inhabitants require."

not in the actual possession of that person. Ordinance, subd. (F); Pet. App. 95-96. The foregoing exception allows firearms possession on County-owned property for events in which that possession can be readily supervised and the firearm is secured when not in the participant's actual possession. Ordinance, subd. (F)(4); Pet. App. 95-96. Some activities the Nordykes allege occur at their trade shows, such as historical reenactments and other firearms-related presentations, are consistent with this exception.[6]

The Alameda County Fair Association ("Fair Association"), a separate non-profit corporation, manages the fairgrounds, and is required to operate the fairgrounds in compliance with all federal, state and local laws. R, T1, 6, ¶ 22; R, T1, 35-37. In the past, Petitioners contracted with the Fair Association to use a part of the fairgrounds for their trade shows, generally for up to five events a year, on an event-by-event basis. R, T1, 7, ¶¶ 27-28. Petitioners then subleased spaces at their trade show events to various different types of vendors, collectors, and the like. R, T1, 8, ¶ 29. A large variety of items are offered for sale at their trade shows, including firearms. R, T1, 3, ¶ 10.

After the Ordinance was adopted, the Fair Association sent Petitioners a letter asking them to provide information as to how they intended to conduct their trade shows in compliance with the Ordinance. R, T1, 3, ¶ 33; R, T1, 36-37. *Petitioners did not respond to the letter.* They then

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[6] Petitioners cite to nothing in the record that would compel the conclusion that there are no circumstances in which this exception could be constitutionally applied. Nevertheless, they mischaracterize the exception as content-based. Pet. 30. What is plain from the record is that Petitioners are not concerned with whether certain activities that occur in conjunction with their trade show ***could*** take place at the fairgrounds consistent with the Ordinance. Instead, what they allege is that because the Ordinance will discourage their firearms vendors from participating in their trade show if it is held at the fairgrounds, it will become unprofitable for them to hold the trade show at the fairgrounds, and as a result, other activities that occur in conjunction with their trade show will also not take place. R, T1, 11, ¶ 37, T1, 17-19, ¶ 59.

filed their original complaint challenging the Ordinance and moved for injunctive relief on their First Amendment and state law preemption claims. R, T1; R, T7. Their original complaint did not plead a Second Amendment claim and they did not brief that claim in connection with their motion seeking injunctive relief.[7]

The District Court denied the motion, concluding that Petitioners had failed to demonstrate a likelihood of success on the merits of the claims pleaded. Pet. App. 46, 72. In examining their state law preemption claim, the District Court considered whether the Ordinance seeks to regulate any matter preempted by any law of general application. The District Court concluded that the Second Amendment afforded them no protection because under controlling law, the Second Amendment only constrains the federal government, not states or local governments. Pet. App. 62. The District Court further noted that while Petitioners had not alleged a Second Amendment claim, they lacked standing to assert such a claim. Pet. App. 63 (citing *Hickman v. Block*, 81 F.3d 98, 100-01 (9th Cir. 1996), *cert. denied*, 519 U.S. 912, 117 S.Ct. 276 (1996)). The District Court went on to find that Petitioners had demonstrated no likelihood of success on the merits of their state law preemption claims. Pet. App. 63-72.

Additionally, the District Court found that Petitioners demonstrated no likelihood of success on the merits with respect to their First Amendment Claims:

> "In contrast to expressive conduct one would uniformly associate with the act of burning our Nation's flag or even a selective service card, possession of a firearm is not an act sufficiently communicative in and of itself to carry a plainly representative or symbolic significance. The record

[7] As noted above and below, Petitioners filed an amended complaint *after* the court entered its order denying their injunction. The amended complaint also pleaded no Second Amendment claim. Resp. App. 9, 14.

> before the court is bereft of any use of the gun that was intended, in and of itself, to convey a message. Indeed, plaintiffs rely on legal conclusions that the possession of the gun is expressive conduct. Plaintiffs' Br. at 4."
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> Pet. App. 52.

The District Court further held that Petitioners' argument that firearms possession should be treated as protected speech "would stretch the scope of speech beyond its constitutional realm, and lacks a principled basis for distinction from the possession of any regulated commodity or object as a 'statement' regarding the propriety of such regulation." Pet. App. 53. Even assuming Petitioners could overcome the initial hurdle of establishing that possession of weapons implicates speech, the trial court concluded the public safety concerns addressed by the Ordinance on its face, without regard to suppression of speech, are "so central to the exercise of local authorities' police power that a triggering incident, such as the 1998 shooting, was not a necessary constitutional predicate to its enactment, but instead only strengthens the conclusion that such a measure furthers a substantial and important interest." Pet. App. 55, n.7.

The District Court also concluded that the Ordinance met all four elements of the test established in *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673 (1968) and that Petitioners' argument that the court should look beyond the face of the Ordinance because of comments by one of the members of the Board of Supervisors[8] was identical to an argument rejected by the *O'Brien* Court:

> "Here, the prohibited conduct is readily severable from the exercise of speech regarding guns. In other words, this ordinance has a distinct public

[8] These are the same alleged statements by Supervisor King that are referred to in the Petition.

> health and safety interest 'unrelated to the suppression of expression.' [quoting *O'Brien*]. [¶] The second problem with the argument is that it asks the Court to strike down the statute based on an improper legislative purpose. In *U.S. v. O'Brien*, the Court rejected the precise line of argument where, as here, the ordinance itself passes constitutional muster. See *U.S. v. O'Brien*, 391 U.S. at 383. The Court explained that the Court 'will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive.' *Id.* The Court called this a 'fundamental principal of constitutional adjudication.' *Id.* Plaintiffs have not presented any reason to set aside such a clear rule."
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> Pet. App. 56.

The District Court also rejected Petitioners' commercial speech challenge, finding that the Ordinance does not prohibit speech associated with the buying or selling of guns or affect any part of the actual speech associated with the offer for sale or such sale.[9] Pet. App. 60.

Petitioners then filed an interlocutory appeal in the Court of Appeals for the Ninth Circuit.[10] They did not brief or argue the Second Amendment in their opening or reply briefs in the Ninth Circuit. After briefing and argument, the Ninth Circuit certified the state law preemption claim to the California Supreme Court on its own motion, asking the question: "Does state law regulating the possession of

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[9] The District Court also concluded that even if *arguendo* the Ordinance incidentally impacts speech, it is a valid time, place or manner regulation, citing to *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 101 S.Ct. 2559 (1981) and relying on that precedent in concluding that a fairgrounds is a different type of public forum from a public street. Pet. App. 58. In particular, the District Court noted that, as in *Heffron*, the regulation of fairgrounds poses special concerns related to crowd control. Pet. App. 58.

[10] *See* List of Parties, n.1, *supra*.

firearms and gun shows preempt a municipal ordinance prohibiting gun possession on county property?" Pet. App. 76.

The California Supreme Court granted certification. *See Nordyke v. King*, 27 Cal.4th 875, 118 Cal.Rptr.2d 761 (Cal. 2002). Referring back to *Great Western Shows, Inc. v. County of Los Angeles*, 27 Cal.4th 853, 118 Cal.Rptr.2d 746 (Cal. 2002), the companion case also before it on certification from the Ninth Circuit, the California Supreme Court noted that it had there concluded that under California Government Code Section 23004(d) a county has substantial authority to manage its property, including the most fundamental decision as to how that property will be used, and that nothing in state law governing gun shows evinces an intent to override that authority. *Nordyke v. King*, 27 Cal.4th 875, 882, 118 Cal.Rptr.2d 761, 766 (Cal. 2002); Pet. App. 86.[11]

After the case was returned to the Court of Appeals for the Ninth Circuit, Petitioners filed a motion for supplemental briefing on the Second Amendment in light of *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001), *cert. denied*, 536 U.S. 907, 122 S.Ct. 2362 (2002) and the change in the United States government's position on the scope of the Second Amendment. Respondents' Appendix ("Resp. App.") 28-33. The three judge panel granted the motion, ordering the simultaneous filing of supplemental briefs by the parties on all constitutional issues. Resp. App. 62.[12]

Subsequently, the Ninth Circuit panel affirmed the District Court order denying the motion for a preliminary injunction, on all claims. *See Nordyke v. King*, 319 F.3d

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[11] Finding it immaterial to the existing litigation, the California Supreme Court declined to address Petitioners' "partial preemption" arguments. Pet. App. 88-89.

[12] Petitioners are thus not correct in stating that the panel "called for" briefing on the Second Amendment issues, suggesting that the panel did so *sua sponte*. Petition 5.

1185 (9th Cir. 2003); Pet. App. 1. Petitioners petitioned for rehearing on the First Amendment claims and rehearing en banc on the Second Amendment claim. Resp. App. 34, 39-40, 57-59. The Ninth Circuit stayed consideration of the petition while the case of *Silveira v. Lockyer*, 312 F.3d 1052 (9th Cir.), *cert. denied*, ___ U.S. ___, 124 S.Ct. 803 (2003) was pending before this Court. The panel later denied the petition for rehearing and two of the judges on the panel voted in favor of granting the petition for rehearing en banc and the third judge on the panel "so recommended." The petition for rehearing en banc was denied. *See Nordyke v. King*, 364 F.3d 1025 (2004); Pet. App. 22.

ARGUMENT: REASONS WHY THE PETITION FOR CERTIORARI SHOULD NOT BE GRANTED

Summary of Argument

As shown more fully below, Petitioners cannot overcome the first obstacle to their Second Amendment claim because on the threshold issue of incorporation, the decision below by the Court of Appeals for the Ninth Circuit is consistent with this Court's prior decisions and those of the sister circuits, all acknowledging that the Second Amendment has not been incorporated against the states by the Fourteenth Amendment. Thus, the Petition fails to establish any ground under U.S. Supreme Court Rule 10 for certiorari review, much less any other compelling reason for that review.

Likewise, on Petitioners' First Amendment claims, the decision below is consistent with the holdings of this Court and those of the sister circuits. Although Petitioners did not even seek rehearing *en banc* on these claims, they urge the extraordinary relief of summary reversal here. Resp. App. 34, 57-59. Consistent with its precedents, this Court should confine review to the public safety findings on the face of the Ordinance, rather than impute improper motives to the legislators as Petitioners urge. Thus, on the First Amendment claims, the Petition also fails to establish any

basis for review, much less any reason for summary reversal. Further, as shown in Respondents' Statement of the Case, the case before the Court is not final. This Court generally does not grant certiorari in the absence of a final judgment. *Virginia Military Inst. v. United States*, 508 U.S. 946, 113 S.Ct. 2431 (1993). Petitioners fail to explain why this Court should grant certiorari here, where no issue fundamental to further conduct of the case must be addressed. *Cf. Land v. Dollar*, 330 U.S. 731, 734 n.2, 67 S.Ct. 1009 (1947).

(1) On The Threshold Question Of Incorporation Of The Second Amendment, The Decision Below Is Consistent With The Holdings Of This Court And Sister Circuit Courts, And Thus There Is No Rule 10 Ground And No Other Compelling Reason For Certiorari Review On That Threshold Issue

This Court follows its own precedents unless they are found to embody clear error, or become unworkable or doctrinally outmoded. *Planned Parenthood of S.E. Pennsylvania v. Casey*, 505 U.S. 833, 854, 112 S.Ct. 2791, 2808 (1992). Before addressing Petitioners' belatedly raised Second Amendment claim, this Court must first determine whether it should reverse its decisions holding that the Second Amendment constrains only federal action. *United States v. Cruikshank*, 92 U.S. 542, 23 L.Ed. 588 (1875); *Presser v. Illinois*, 116 U.S. 252, 6 S.Ct. 580 (1886); *see also* John E. Nowak and Ronald D. Rotunda, CONSTITUTIONAL LAW 332-334 (4th ed. 1991) (explaining that this Court has rejected "total incorporation" and that the entire Bill of Rights has not been incorporated). As discussed more fully below, there has been no evolution of legal principle or development of constitutional law that would make obsolete these precedents. *See Casey, supra,* 505 U.S. at 857.

Incorporation is the *threshold issue* raised by Petitioners' Second Amendment claim: Whether they have standing to raise a Second Amendment claim, and what right is protected by the Amendment are questions that

need not be answered *unless and until* the Court first finds that the Second Amendment protects against infringement by the *state*. That is, even if this Court were to determine that the Second Amendment protects an individual right to possess firearms, as Petitioners urge, the Court would still need to resolve whether, under the Fourteenth Amendment Due Process Clause, individual possession of hand-held weapons (e.g. "arms")[13] implicates a right so rooted in the traditions and conscience of the American people as to be ranked "fundamental." *See Washington v. Glucksberg*, 521 U.S. 702, 721, 117 S.Ct. 2258, 2268 (1997) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105, 54 S.Ct. 330, 332 (1934)). Assuming *arguendo* the Second Amendment protects an individual right, it is by no means evident that such a right is a fundamental right "implied in the concept of ordered liberty." *Id.* For example, while forty-two (42) states have state constitutional provisions that explicitly recognize an individual right to bear arms distinct from militia-related activity, or the state courts have interpreted the right in this manner, in only three (3) of those states have the courts held that the right is fundamental (Ohio, Montana and Wisconsin).[14] Resp. App. 98-100; *see also* state by state analysis of state right to bear arms provisions and relevant law set forth at http://www.firearmslawcenter.org.

This Court's decisions addressing challenges to federal weapons laws also indicate that this Court does not consider weapons regulation to "trench upon any constitutionally protected liberties." *See Lewis v. United States*, 445 U.S. 55, 65 n.8, 100 S.Ct. 915, 921 n.8 (1980) (rejecting a constitutional challenge to a felon in possession law, citing

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[13] "Arms" is defined as "anything that a man wears for his defense, or takes in his hands as a weapon." DELUXE BLACK'S LAW DICTIONARY 109 (6th ed. 1990).

[14] Even in those three states, the courts use a "reasonableness test" in such challenges. In Alaska and New Hampshire, the courts require a substantial interest/narrow means test.

Miller, *infra*, and stating that legislative firearms restrictions "are neither based upon constitutionally suspect criteria, nor do they trench upon any constitutionally protected liberties."). *See also Burton v. Sills*, 394 U.S. 812, 89 S.Ct. 1486 (1969) (dismissing an appeal for "want of a substantial federal question" where a state court held that the Second Amendment does not confer a right to bear arms unrelated to militia service). This Court has never found any federal firearms or other weapons regulation to implicate a fundamental right and has reviewed various federal firearms regulations without addressing the Second Amendment. *See United States v. Bean*, 537 U.S. 71, 123 S.Ct. 584 (2002); *United States v. Lopez*, 514 U.S. 549, 115 S.Ct. 1624 (1995).

For this Court to adjudicate the question of Second Amendment "incorporation" on this record would also violate the Court's tenet against deciding any constitutional question except with reference to the particular facts to which it is to be applied or prematurely. *See Clinton v. Jones*, 520 U.S. 681, 690 n.11, 117 S.Ct. 1636, 1642 (1997) (quoting *Alabama State Federation of Labor v. McAdory*, 325 U.S. 450, 461, 65 S.Ct. 1384, 1389-1390 (1945)). As noted above, the complaint pleads no Second Amendment violation. On the facts pleaded below, both the trial court and the Ninth Circuit upheld the Ordinance against the First Amendment challenges. Nothing in the Petition or the opinions below explains how or why the Second Amendment, if held incorporated, would preclude such a reasonable exercise of the local police power.

At most, what the Petition and the opinions below do present, *in the abstract*, is one side of an ongoing debate regarding the nature of the right protected by the Second Amendment. As discussed more fully below, that debate reflects no new consensus from which this Court could divine an evolution of legal principle rendering its earlier decisions regarding incorporation of the Second Amendment

or the scope of the Second Amendment "obsolete." *See Casey, supra,* 505 U.S. at 857.[15]

(2) Even If It Were "Incorporated," The Second Amendment Protects Only Conduct That Bears Some Reasonable Relationship To The Well Regulated Militia; And Petitioners Fail To Show That The Ordinance Infringes Such Protected Activity

Even if this Court's incorporation doctrine did not bar Petitioners' Second Amendment claim, Petitioners have failed to demonstrate that they stand in a position to show legal injury in connection with that claim. Although this Court's Second Amendment jurisprudence has not been extensive, it has been consistent. This Court has never recognized an unqualified, individual right under the Second Amendment to possess hand-held weapons generally or firearms specifically, and has linked the right protected by the Second Amendment to the "preservation or efficiency of a well regulated militia." *United States v. Miller*, 307 U.S. 174, 178, 59 S.Ct. 816 (1939); *see also Lewis v. U. S.*, *supra*, 445 U.S. at 65 n.8; *see also Burton, supra,* 394 U.S. 812 discussed above. Moreover, as noted above, the Court has reviewed individual challenges to federal firearms laws without addressing the Second Amendment at all.

The federal circuits that have addressed the scope of Second Amendment have implemented the *Miller* holding in various ways. All except the Fifth Circuit characterize the right protected by the Amendment as collective in

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[15] Given this lack of analysis of the Second Amendment claim as applied to the facts of this case, Petitioners' statement that "[e]very one of the Ninth Circuit judges who authored an opinion in this case on the Second Amendment, have [sic] suggested that Petitioners should have won[,]" is humorous and wrong. Pet. 8. At most, these judges suggested they agree with Petitioners' view of the Second Amendment. However, this is a lawsuit, not a debate.

nature or encompassing only those activities reasonably related to the preservation or efficiency of a well regulated militia. *See Silveira*, *supra*, 312 F.3d at 1063 n.10 (summarizing the relevant circuit decisions). In the Ninth Circuit, the court has developed an Article III "standing" rule. *Hickman v. Block*, 81 F.3d 98, 102 (9th Cir. 1996). This "standing" rule is consistent with the *Miller* holding (albeit an evolution out of that holding), and the relevant holdings of the other circuit courts, except the Fifth Circuit, because the "standing" rule requires that the Second Amendment be asserted in connection with the preservation or efficiency of the well regulated state militia. *Hickman*, 81 F.3d at 102-103.

In contrast, Petitioners' reading of *Miller* ignores the foregoing aspect of *Miller* and the procedural context of the case. In *Miller*, a federal indictment issued against two individuals accused of transporting a shotgun with a shortened barrel from Oklahoma into Arkansas without registering the weapon in violation of the National Firearms Act. They successfully demurred to the indictment on the ground that the Act violated their "right to keep and bear Arms" under the Second Amendment. The indictment was quashed, and judgment entered against the federal government. *Miller*, 307 U.S. at 175-176.

The United States then appealed directly to the Supreme Court, seeking to have the indictment reinstated. The defendants made no appearance in the appeal. *Id.* at 175. Thus, other than the firearm itself, the Court had nothing before it to consider on the issue of whether defendants possessed that weapon for purposes having some reasonable relationship to the preservation or efficiency of the well regulated militia.[16] What is very clear from the opinion is that the Court considered

[16] Therefore, there is nothing in the case or the lower court decision from which Petitioners could derive a conclusion regarding what claims the defendants made or did not make regarding the militia.

evidence of such a relationship essential to a claim under the Second Amendment:

> "The Constitution as originally adopted granted to the Congress power – 'To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.' U.S.C.A. Const. art 1, s 8. With obvious purpose to assure the continuation and render possible the effectiveness of such forces the declaration and guarantee of the Second Amendment were made. It must be interpreted and applied with that end in view."
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> *Miller*, 307 U.S. at 178.

Without anything evidentiary before the Court – *except the weapon* – the Court concluded it could not infer anything regarding the requisite relationship to that "obvious purpose" from the firearm alone: "Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense." *Id.* at 177.

It is one thing for a reviewing court to avoid unnecessary adjudication of a constitutional issue, especially in the total absence of the parties raising it below, and to dispose of the matter by concluding that even if the claimed right exists, it does not protect the conduct at issue, as the Court did here. It is another thing entirely for the reviewing court to accept the right claimed. Thus, the *Miller* Court did not characterize the right protected by the Second Amendment as either individual or collective. However, what *Miller* establishes about the Second Amendment is stated exactly by the Court, as quoted above. Because Petitioners ignore this admonition as to

how the Second Amendment is to be interpreted and applied, Petitioners unsuccessfully reduce *Miller* to the rule Petitioners would like to posit, e.g., that the Second Amendment guarantees possession by individuals of military-type weapons.[17] Pet. 20.

As shown above, the Ninth Circuit "standing" rule is consistent with the militia-based interpretation of the Second Amendment enunciated by this Court in *Miller*. Contrary to the claims of Petitioners and the dissenting opinions below, there has been no "development of constitutional law" or consensus on the Second Amendment that would make the Ninth Circuit's implementation of *Miller* erroneous.

Granted there have been a number of articles, principally in law school law journals (which are not peer-reviewed) promoting an individual rights, non-militia based interpretation of the Second Amendment. *See* Carl T. Bogus, *The History and Politics of Second Amendment Scholarship: A Primer*, 76 CHI.-KENT L. REV. 3, 8-10 (2000).[18] In turn, these articles have been criticized in other scholarly articles. *See id.* Some of the most severe critics have been historians, who take issue with how the "individual rights" authors read (or fail to read) aspects of

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[17] Ironically, Petitioners' strained interpretation of *Miller* directly contradicts Petitioners' and the dissenting judges' view that Petitioners' Second Amendment individual rights claim is a better claim for this Court to review on writ of certiorari than was that of the *Silveira* petitioners, who sought review of the Ninth Circuit's decision upholding California's *assault weapon* ban against a Second Amendment individual rights challenge. Pet. 8, 9. Certainly it is hard to imagine a better case than *Silveira* for judicial review under the Second Amendment of the alleged individual Second Amendment right to possess military-style weapons that Petitioners derive from *Miller*.

[18] Notably there are more articles than authors because a number of the authors have contributed multiple articles supporting the "individual rights" view. *See* Matthew S. Nosanchuk, *The Embarrassing Interpretation of the Second Amendment*, 29 N. KY. L. REV. 705, 771 (2002).

the relevant historical record.[19] Even Sanford Levinson, whose article "*The Embarrassing Second Amendment*," 99 YALE L.J. 637 (1989) is credited with inaugurating the

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[19] For example, historian Don Higginbotham explores the failure of the recent scholarship to examine the state militias as an institution: "Virtually absent from these gun ownership and gun rights arguments, in both the legal and the historical literature, is what Americans had to say about control of the state militias before, during, and after the writing of the Constitution. The subject is important because it shows how radical was the shift from the states' total control of their militias to the sharing of the authority under the Constitution, how disturbing this development was to the Antifederalists, how James Madison dealt with Antifederalist concerns in the Second Amendment and, finally, how the issue was resolved in the first half of the nineteenth century." Don Higginbotham, *The Federalized Militia Debate: A Neglected Aspect of Second Amendment Scholarship*, 55 WM & Mary Q. 39, 40 (1998) at Resp. App. 62. *See also* Robert E. Shalhope, *To Keep and Bear Arms in the Early Republic*, 16 CONST. COMMENTARY 269, 272-273 (1999). Shalhope questions the "insurrectionist" theory of the Second Amendment, noting that the individuals who mounted early insurrections such as the Whiskey Rebellion "clearly believed the militia to be literally the entire body of the people in arms" rising up against what they perceived as government tyranny, "[b]ut those who had been involved in writing both the Constitution and the Bill of Rights – Antifederalists as well as Federalists – united in opposition to such uprisings. These people distinguished between the orderly use of extra-legal action during the Revolution – when the people had no legal recourse to challenge the unjust acts of Parliament – and the insurrections in western Pennsylvania. *All agreed that individuals could not spontaneously constitute themselves as militia units outside the control of the state or assert an individual right to bear arms to check government tyranny.*" Similarly, in the context of the "individual rights" theorists' reliance on the right to bear arms provisions of the original Pennsylvania Constitution, historian Saul Cornell points out that the Pennsylvania Test Acts, enacted shortly after that Constitution, imposed penalties on citizens who refused to take a state loyalty oath, including stripping them of their right to vote, to sit on juries, *and disarming them*. Saul Cornell, *"Don't Know Much About History" The Current Crisis in Second Amendment Scholarship*, 29 N. KY. L. REV. 657, 670-72 (2002). Cornell notes that "[a]lthough a number of legal scholars have been won over to the individual rights view, most early American historians reject that view." *Id.* at 661.

spate of recent "individual rights" articles, concedes that the claim that this scholarship represents the "standard" view of the Amendment is unwise. *See* Sanford Levinson, THE HISTORIANS' COUNTERATTACK: SOME REFLECTIONS ON THE HISTORIOGRAPHY OF THE SECOND AMENDMENT, GUNS, CRIME AND PUNISHMENT IN AMERICA 93 (Harcourt ed. 2003).

Many prominent scholars have endorsed a militia-based view of the right protected by the Second Amendment. *See, e.g.*, Jack N. Rakove, *The Second Amendment: The Highest Stage of Originalism*, 76 CHI.-KENT L. REV. 103 (2000); David Yassky, *The Second Amendment: Structure, History, and Constitutional Change*, 99 MICH. L. REV. 588 (2000); Saul Cornell, *Commonplace or Anachronism: The Standard Model, The Second Amendment, and the Problem of History in Contemporary Constitutional Theory*, 16 CONST. COMMENTARY 221 (1999); Garry Wills, A NECESSARY EVIL: A HISTORY OF AMERICAN DISTRUST OF GOVERNMENT (1999); Kenneth R. Bowling, *"A Tub to the Whale": The Founding Fathers and Adoption of the Federal Bill of Rights*, 8 J. EARLY REPUBLIC 223 (1988); Carl T. Bogus, *The Hidden History of the Second Amendment*, 31 U.C. DAVIS L. REV. 309, 376 n.318 (1998); Lawrence D. Cress, *An Armed Community: The Origins and Meaning of the Right to Bear Arms*, 71 J. AM. HIST. 22 (1984). *See also Silveira, supra*, 312 F.3d at 1065-66, 1070 (citing some of the foregoing articles as well as other texts and articles supporting a collective-rights based interpretation of the Amendment).

Petitioners and the dissenting opinions below point to the Fifth Circuit's opinion in *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001), *cert. denied*, 536 U.S. 907, 122 S.Ct. 2362 (2002), as articulating the "individual rights" view of the Second Amendment on which scholarly consensus has *allegedly* been reached. However, historian Cornell points out that the Fifth Circuit made little use of even the relevant academic law review literature, quoting extensively instead from a text supplied to the court by the Second Amendment Foundation, entitled *The Origin of the*

Second Amendment. Cornell states that the numerous errors he found when checking the references cited in that text suggest that the *Emerson* court erred in treating it as an authoritative scholarly text. *See* Saul Cornell, *"Don't Know Much About History" The Current Crisis in Second Amendment Scholarship*, 29 N. KY. L. REV. 657, 677 (2002).

Likewise, since the *Emerson* case was handed down, no other federal circuit court has reinterpreted the Second Amendment as protecting a personal, individual right. Accordingly, there is also no development of *constitutional law* that would even place in question the Ninth Circuit's "standing" rule.[20]

(3) Under Any Interpretation Of The Second Amendment, Petitioners Have Established No Standing To Assert That Right

Assuming *arguendo* a non-militia based, extreme individual-rights interpretation of the Second Amendment, neither Petitioners, nor the dissenting opinions below explain why Petitioners, as trade show operators, have standing to raise that claim on their own behalf. Further,

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[20] That Congress has made a statement defining the scope of the Second Amendment when enacting legislation (Pet. 15, 16) and that the U.S. Attorney General and Solicitor General now interpret the Second Amendment in a manner at odds with the interpretation of every federal circuit addressing that issue since *Miller* except the Fifth Circuit, are interesting facts but only from the point of view of separation of powers. This Court continues to make clear that under the U.S. Constitution it is the judicial branch that determines what the law is, not the executive or legislative branch. *See Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137 (1803); *see also J.E.M. AG Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 130-131, 122 S.Ct. 593 (2001) (determining that newly developed plant breeds are patentable, and citing to *Diamond v. Chakrabarty*, 447 U.S. 303, 315, 100 S.Ct. 2204, 2211 (1980) ("It is of course correct that Congress, not the courts, must define the limits of patentability; but it is equally true that once Congress has spoken 'it is the province and duty of the judicial department to say what the law is.'")).

to the extent that Petitioners seek to assert the alleged individual, Second Amendment rights of their gun vendors and some trade show attendees,[21] they establish no legal basis for third-party standing. *See Elk Grove Unified School District v. Newdow*, ___ U.S. ___, 124 S.Ct. 2301, 2309 (2004) (explaining that this Court's standing jurisprudence contains Article III standing and prudential standing; that prudential standing encompasses the rule barring a litigant from raising another's legal rights, and barring adjudication of generalized grievances more appropriately addressed by the representative branches).[22] What is clear is that the Petition and the dissenting opinions nowhere explain how any interpretation of the Second Amendment compels the County to regulate its property so that Petitioners may continue to hold their trade shows there profitably, or how Petitioners have standing under that Amendment to sue the County if it does not so regulate its property.

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[21] Respondents do not concede that these individuals have standing to raise such claims either. *See* Section (2), above.

[22] Moreover, while Judge Gould's opinion characterizes the Ordinance as having "the effect of foreclosing a traditional gun show" (Pet. App. 26), it is unclear what he understands that term to mean or what he believes it signifies here. The Code of Federal Regulations, Title 27, Chapter 1, Subchapter M, Part 178, Section 178.100(b)(1)(B) defines a gun show as "a function sponsored by any national, state or local organization, devoted to the collection, competitive use, or other sporting use of firearms or an organization or association that sponsors functions devoted to the collection, competitive use, or other sporting use of firearms." California state law incorporates this definition. *See* Cal. Penal Code § 12071(b)(1)(B) (stating, in pertinent part: "[a] person licensed pursuant to subdivision (a) may take possession of firearms and commence preparation of registers for the sale, delivery, or transfer of firearms at gun shows or events, as defined in section 178.100 of Title 27 of the Code of Federal Regulations, or its successor, if the gun show or event is not conducted from any motorized or towed vehicle. . . . ").

(4) Even If Petitioners Could Establish Standing To Assert An Individual Right To Bear Arms, Under Any Interpretation Of The Second Amendment The Challenged Ordinance Is Reasonable And Thus Constitutional

Even if Petitioners overcame the hurdles of incorporation and standing, it is not necessary for this Court to examine the merits of their individual rights claim. Under any interpretation of the Second Amendment, the Ordinance is a reasonable regulation, narrowly drawn to further a substantial purpose, and thus it would not violate the Amendment. *See, e.g., Emerson, supra,* 270 F.3d 203, 261 (acknowledging that the right protected by the Second Amendment is subject to reasonable restrictions); *see also* Resp. App. 98-100 (illustrating that in the forty-two (42) states where the state constitution contains a provision protecting an *individual* "right to keep and bear arms," the state courts in forty (40) of these states use a "reasonableness" test in challenges to firearms laws under the constitutional provisions).

Neither the Petition nor any of the dissents proposes how an individual-rights interpretation of the Second Amendment would place in question the legislative action challenged. In fact, courts have found constitutional local firearms laws that are far more restrictive than the Ordinance, when those laws were challenged under state constitutional provisions *expressly* protecting an individual right to possess arms. *See, e.g., Quilici v. Village of Morton Grove*, 695 F.2d 261 (7th Cir. 1982), *cert. denied,* 464 U.S. 863, 104 S.Ct. 194 (1983) (upholding village-wide ban on handgun possession against challenge based on state constitutional right to bear arms); *see also Arnold v. City of Cleveland*, 67 Ohio St.3d 35, 43, 616 N.E.2d 163 (1993) (upholding city-wide ban on possession and sale of assault weapons against state constitutional right to bear arms challenge).

(5) Petitioners' *Failure* To Convince The Trial Court Or The Three-Judge Ninth Circuit Panel That The Ordinance Implicates The First Amendment Does Not Support Summary Reversal.

As noted above, Petitioners did not believe their First Amendment claim was strong enough to seek rehearing en banc on that claim. Resp. App. 34, 39-40, 57-59. Yet here they seek the extraordinary remedy of summary reversal. However, as shown below, the Ordinance regulates conduct, not speech. Even assuming *arguendo* an incidental impact on speech, the Ordinance is a valid time, place or manner restriction because it is narrowly drawn, serves a substantial interest not connected to the suppression of speech and leaves open ample alternative forums. Pet. App. 57-58. Summary reversal on this claim is therefore not appropriate.

The threshold inquiry in every First Amendment claim is whether the challenged government action involves speech or expression. *Texas v. Johnson,* 491 U.S. 397, 403-404, 109 S.Ct. 2533, 2538-2539 (1989). Conduct does not possess sufficient communicative elements to bring the First Amendment into play unless an intent to convey a message is present and "the likelihood [is] great that the message would be understood by those who viewed it." *Id.* at 404. As the District Court concluded, Petitioners do not and cannot meet this burden. *Mere possession* of guns on County-owned property conveys no clear message to anyone. Pet. App. 52-55. Petitioners admit that persons possess guns at their trade show for a host of reasons, to sell, to use as props, because the particular firearm has some alleged military or historical importance, as a political statement, etc. R, T1, 3, ¶ 10; 9-10, ¶ 36.

This Court has consistently rejected the notion that "an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *O'Brien,* 391 U.S. at 376. Moreover, the only cases in which this Court has

invalidated laws regulating *expressive* conduct are those in which it has concluded that the government has prohibited that conduct "*precisely because of its communicative attributes*." *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 577, 111 S.Ct. 2456, 2466 (1991) (Scalia, J. concurring) (citing *Texas, supra, Spence, supra,* among other cases) (emphasis in original).

As the District Court recognized, the County passed the Ordinance in the *interests of the public health and safety*. Pet. App. 54-55. The stated public safety reasons are unrelated to any alleged communicative aspects of gun possession. Pet. App. 56. Even assuming *arguendo* an incidental restriction on First Amendment freedom of speech or association rights resulting from the Ordinance, such restriction is no greater than essential for furtherance of this governmental interest. Accordingly, the Ordinance meets the test established in *O'Brien*. *See* 391 U.S. at 369.

Moreover, a facial First Amendment claim such as Petitioners' fails unless the challenged law is directed narrowly and specifically at expression or conduct commonly associated with expression. *See Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 760, 108 S.Ct. 2138 (1988). Firearms possession, to which the Ordinance is directed, fits into neither category. *See, e.g., Broadrick v. Oklahoma,* 413 U.S. 601, 615, 93 S.Ct. 2908, 2917-2918 (1973) (examining a facial overbreadth challenge to a law regulating conduct and stating "[a]lthough such laws, if too broadly worded, may deter protected speech to some unknown extent, there comes a point where that effect – at best a prediction – cannot, with confidence, justify invalidating a statute on its face and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe.").

Petitioners' effort to claim First Amendment protection because some vendors display inscribed firearms and antique firearms also fails. *See One World One Family Now v. City and County of Honolulu*, 76 F.3d 1009, 1012-1015, 1012 n.4 (9th Cir. 1996), *cert. denied*, 519 U.S. 1009,

117 S.Ct. 554 (1996). Like the Ordinance in *One World,* the challenged Ordinance meets the test for a valid time, place or manner restriction, as described above and as the District Court found, even if *arguendo* the presence of inscribed or embellished items at trade shows implicates the First Amendment. R, T15, 9-10. Petitioners' challenge is governed by *One World* except that the Ordinance is challenged with respect to the fairgrounds, a *limited public forum*, while the ordinance in *One World* involved the sidewalks, a traditional public forum. *See Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 101 S.Ct. 2559 (1981). Even in a *traditional public forum*, however, where a regulation does not exclude speakers from that forum based on speech content, the appropriate standard is the standard governing time, place or manner restrictions – the same standard that applies *to a limited public forum*. *See One World*, 76 F.3d 1009, 1012.

Like the ordinance in *One World,* the challenged Ordinance also leaves open ample alternate channels of communication. *None of the speech or associational activities that the Nordykes allege occur at their trade shows are prohibited by the Ordinance.* Thus, the Fairgrounds remains a forum for those activities. In addition, there are ample places where trade shows may be held that are not governed by the Ordinance.[23]

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[23] According to the estimates of the National Association of Arms Shows, every weekend in this country there are more than 100 shows where firearms are available for sale and purchase (i.e., more than 5000 a year). *See* Tom Diaz, MAKING A KILLING: THE BUSINESS OF GUNS IN AMERICA 49 (1999) (citing *"Gun Show Dealers Spread Thin," Firearms Business*, Nov. 15, 1995, at 4). This proliferation of gun sale-type shows results directly from provisions of the 1986 Firearms Owners' Protection Act (aka McClure-Volkmer) which liberalized the restrictions on licensed dealer sales, enabling licensed dealers to sell firearms away from their licensed premises if at a "gun show or event" held in the same state. Diaz, *supra* at 49 (citing a letter submitted to hearings of

(Continued on following page)

While it is unclear whether Petitioners also seek summary reversal of their commercial speech claim, neither reversal nor review of that claim is warranted because as the courts below readily concluded, the Ordinance infringes no commercial speech rights. It is established law that the buying and selling of guns is commercial activity, not speech and that such activity *per se* is not afforded First Amendment protection. *See Nordyke v. Santa Clara County,* 110 F. 3d 707, 710 (9th Cir. 1997) ("*Nordyke I*") ("We agree that the act of exchanging money for a gun is not 'speech' within the meaning of the First Amendment.").

Unlike the ordinance in *Nordyke I,* the challenged Ordinance does *not* prohibit offers for sale and/or an invitation for an offer to purchase. It also does *not* prohibit speech aimed at soliciting, offering or engaging in sales of guns. All of those activities are *permitted* under the Ordinance. The *only* thing prohibited by the Ordinance is *actual possession* of firearms on County-owned property. Moreover, this prohibition is effected by the *Ordinance*, not by a lease addendum or contract.

Petitioners complain that the Ordinance prohibits display of the firearms by persons who wish to display them. However, as *Nordyke I* demonstrates, if possession of firearms is prohibited by law, display for whatever purpose is no longer a lawful activity and need not be protected. A person's desire to display an item does not create a First Amendment right to display that item in a location where a content-neutral law prohibits its possession.

Finally, the Ordinance is also well within the constitutional scope of government regulation of activities on the fairgrounds under the "public forum doctrine." As noted above, the fairgrounds is, *at most*, a limited public forum. *See Heffron, supra*, 452 U.S. at 656 (1981) (state fairgrounds in use for a *state fair* was a *limited* public forum).

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the U.S. House Subcommittee on Crime and Criminal Justice by an executive director of the National Alliance of Stocking Gun Dealers).

Even if the fairgrounds were a traditional public forum – and it is *not* – the challenged Ordinance, like the ordinance in *One World*, does not discriminate against any class of speakers based on content of their speech. R, T13, 10-11; *One World*, 76 F.3d 1009, 1012. Accordingly, the challenged Ordinance meets the test for a valid time, place or manner restrictions.

This Court's precedents also prohibit Petitioners from bringing their claims within the ambit of the First Amendment by urging this Court to second-guess the motives of the legislators in adopting the Ordinance. Reduced to its essence, this attempt to force the Court behind the legislative findings on the face of the Ordinance comprises Petitioners' entire argument for summary reversal on the First Amendment claims.[24] Judicial probing into legislative motives is barred by the doctrine of *separation of powers,* as recognized in the "deliberative process privilege." *United States v. Morgan*, 313 U.S. 409, 61 S.Ct. 999 (1941).

The courts have consistently reaffirmed this prohibition on second-guessing the motives of legislators. R, T15, 8-9. *See, e.g., City of Las Vegas v. Foley*, 747 F.2d 1294, 1297-1298 (9th Cir. 1984) (citing *Hing v. Crowley,* 113 U.S. 703, 710-11, 5 S.Ct. 730 (1885) ("Individual legislators may vote for a particular statute for a variety of reasons. 'The diverse character of such motives, and the impossibility of penetrating into the hearts of men and ascertaining the truth, precludes all such inquiries as impracticable and futile.'")). Moreover, as the District Court specifically found and as is shown here, the Ordinance itself passes constitutional muster. This Court will not strike down an

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[24] Petitioners improperly characterize Supervisor King's statements in a memo and a press release before the Ordinance was given a first reading and statements they allege she made at a press conference as the "legislative history." Moreover, as shown here, judicial review is confined to the face of the Ordinance.

otherwise constitutional statute on the basis of an *alleged* illicit legislative motive. *O'Brien*, 391 U.S. at 383.

Petitioners string together statements from various First Amendment cases, taken out of context, and attempt to cobble together a rule that any regulation that "affects" First Amendment interests must be narrowly drawn to effectuate a compelling state interest. Pet. 27. However, this rule is unsupported by this Court's decisions, *including those cited* by Petitioners. *Perry Educ. Ass'n v. Perry Local Educators*, 460 U.S. 37, 103 S.Ct. 948 (1983) involves a challenge to a provision in a collective bargaining agreement giving one union's bargaining representative exclusive access to teachers' mailboxes. The Court found that the mailboxes were not traditional or limited public forums and upheld the provision as reasonable. In deciding the issue, the Court summarized the rule that in a public forum, a state may enforce content-neutral regulations of time, place or manner provided they serve a significant government interest and are narrowly drawn. In the context of *content-based* regulations, the Court noted that such a regulation must be necessary to serve a compelling state interest, and must be narrowly related to that interest. The case does not establish that the compelling state interest rule applies where the regulation at issue is content-neutral, as here. The case is consistent with the cases cited by Respondents.

In *Meyer v. Grant*, 486 U.S. 414, 427, 108 S.Ct. 1886 (1988) the Court invalidated a state law prohibiting paid circulars for initiative petitions, finding that presenting written viewpoints about such petitions was "core political speech," and the prohibition on paid circulars had the effect of limiting that speech. Similarly, *Board of Airport Commissioners v. Jews for Jesus*, 482 U.S. 569, 107 S.Ct. 2568 (1987) invalidated a Board resolution banning "First Amendment activities" at Los Angeles International Airport. The Court found that the resolution prohibited all expressive activity and did not seek to regulate merely

expressive activity that might create problems such as congestion. Here the Ordinance regulates conduct, not speech, and furthers a substantial public interest without regard to speech content. Further, as shown above, even assuming *arguendo* an incidental impact on speech, the Ordinance is a valid time, place or manner regulation, as defined in *Perry*.

Similarly, Petitioners cite *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston,* 515 U.S. 557, 569, 115 S.Ct. 2338 (1995) for the proposition that display of guns should be protected. In *Hurley,* the Court struck down a state court order requiring a private group that was planning a parade to include the Irish-American Gay, Lesbian and Bisexual Group in the parade. In discussing parades, the Court noted that "The protected expression that inheres in a parade is not limited to its banners and songs, however, for the Constitution looks beyond written or spoken words as mediums of expression." *Id.* Petitioners fail to show how this observation undermines this Court's cases regarding content-neutral regulation cited by Respondents above. Likewise, in *Edwards v. Goldsboro,* 178 F.3d 231 (4th Cir. 1999), a police officer was suspended for teaching a course in handgun safety, off duty, at a location unrelated to the City, after he was previously denied permission to do so by the police chief. He sued under Section 1983 and his claims were dismissed after his motion for leave to amend was denied. The Fourth Circuit reinstated several of his claims, including his First Amendment claims, finding his teaching of the safety course to be protected by the First Amendment. Petitioners fail to show how this holding precludes a content-neutral, time, place or manner prohibition of firearms on certain county-owned property that leaves open ample alternative forums for handgun-safety courses.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the petition for certiorari and Petitioners' request for summary reversal be denied.

Respectfully submitted,

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California Statutes

Cal.Health & Safety Code § 34240.

Housing authority of county or city; transaction of business; resolution of governing body

In each county and city there is a public body corporate and politic known as the housing authority of the county or city. The authority shall not transact any business or exercise its powers unless, by resolution, the governing body of the county or city declares that there is need for an authority to function in it.

West's Ann.Cal.Health & Safety Code § 34240

Cal. Health & Safety Code § 34201.

Legislative findings and declaration of policy

It is hereby declared:

(a) That there exist in the State insanitary or unsafe dwelling accommodations and that persons of low income are forced to reside in such accommodations; that within the State there is a shortage of safe or sanitary dwelling accommodations available at rents which persons of low income can afford and that such persons are forced to occupy overcrowded and congested dwelling accommodations; that these conditions cause an increase in and spread of disease and crime and constitute a menace to the health, safety, morals, and welfare of the residents of the State and impair economic values; that these conditions necessitate excessive and disproportionate expenditures of public funds for crime prevention and punishment, public health and safety, fire and accident protection, and other public services and facilities.

(b) That these slum areas cannot be cleared, nor can the shortage of safe and sanitary dwellings for persons of low income be relieved, through the operation of private enterprise, and that the construction of housing projects for persons of low income would therefore not be competitive with private enterprise.

(c) That the clearance, replanning, and reconstruction of the areas in which insanitary or unsafe housing conditions exist and the providing of safe and sanitary dwelling accommodations for persons of low income are public uses and purposes for which public money may be spent and private property acquired and are governmental functions of state concern; that it is in the public interest that work on such projects be commenced as soon as possible in order to relieve unemployment which now constitutes an emergency; and the necessity in the public interest for the provisions of this chapter is declared as a matter of legislative determination.

West's Ann.Cal.Health & Safety Code § 34201

Cal. Health & Safety Code § 34400.

Property and bonds of housing authority exempted from taxation

It has been found and declared in the Housing Authorities Law [Section 34200] and the Housing Cooperation Law [Section 34500 *et seq.*] (a) that there exist in the State housing conditions which constitute a menace to the health, safety, morals and welfare of the residents of the State; (b) that these conditions necessitate excessive and disproportionate expenditures of public funds for crime prevention and punishment, public health and safety, fire

and accident prevention, and other public services and facilities; (c) that the public interest requires the remedying of these conditions by the creation of housing authorities to undertake projects for slum clearance and for providing safe and sanitary dwelling accommodations for persons who lack sufficient income to enable them to live in decent, safe and sanitary dwellings without overcrowding; and (d) that such housing projects are for public uses and purposes and are governmental functions of state concern. As a matter of legislative determination, it is hereby found and declared that the property and bonds of a housing authority are of such character as shall be exempt from taxation.

West's Ann.Cal.Health & Safety Code § 34400

Cal. Health & Safety Code § 34315.

Acquisition and disposition of property; insurance; loans

An authority may:

(a) Lease or rent any dwellings, houses, accommodations, lands, buildings, structures, or facilities embraced in any housing project, or a project assisted pursuant to Section 34312.3, and establish and revise the rents or charges for them.

(b) Own, hold, and improve real or personal property.

(c) Purchase, lease, obtain option upon, acquire by gift, grant, bequest, devise,or otherwise, any real or personal property or any interest in property.

(d) Acquire any real property by eminent domain.

(e) Sell, lease, exchange, transfer, assign, pledge, or dispose of any real or personal property or any interest in it.

(f) Insure or provide for the insurance of any real or personal property or operations of the authority against any risks or hazards.

(g) Lend upon the security of a mortgage or deed of trust, directly or by purchase from one or more qualified mortgage lenders, in connection with the sale of real property to persons of low income and to other persons pursuant to Section 34312.3, moneys for the financing of construction or rehabilitation pursuant to this part, or the implementation of government housing and rehabilitation financing programs for persons of low income and for other persons when acting pursuant to authorization contained in Section 34312.3, Part 13 (commencing with Section 37910) of this division, or Part 3 (commencing with Section 50900) of Division 31, subject only to the limitations on income of borrowers or residents prescribed by the statutory provisions under which the authority is acting. With respect to financing activities conducted pursuant to Part 3 (commencing with Section 50900) or Part 4 (commencing with Section 51600) of Division 31, the authority shall obtain certification as a qualified mortgage lender pursuant to Section 50094.

(h) Procure insurance or guarantees from the federal government or the California Housing Finance Agency or from any person licensed to insure mortgages in this state of the payment of all or part of any debts, whether or not incurred by the authority, secured by mortgages or deeds of trust on any property included in any of its housing projects or otherwise financed pursuant to this chapter or

secured by mortgages or deeds of trust pursuant to Part 13 (commencing with Section 37910) of this division or Part 3 (commencing with Section 50900) of Division 31.

West's Ann.Cal.Health & Safety Code § 34315

Cal. Penal Code § 171b.

Unauthorized possession of weapons in state or local public building or at public meeting; offense; punishment

(a) Any person who brings or possesses within any state or local public building or at any meeting required to be open to the public pursuant to Chapter 9 (commencing with Section 54950) of Part 1 of Division 2 of Title 5 of, or Article 9 (commencing with Section 11120) of Chapter 1 of Part 1 of Division 3 of Title 2 of, the Government Code, any of the following is guilty of a public offense punishable by imprisonment in a county jail for not more than one year, or in the state prison:

(1) Any firearm.

(2) Any deadly weapon described in Section 653k or 12020.

(3) Any knife with a blade length in excess of four inches, the blade of which is fixed or is capable of being fixed in an unguarded position by the use of one or two hands.

(4) Any unauthorized tear gas weapon.

(5) Any taser or stun gun, as defined in Section 244.5.

(6) Any instrument that expels a metallic projectile, such as a BB or pellet, through the force of air pressure, CO_2

pressure, or spring action, or any spot marker gun or paint gun.

(b) Subdivision (a) shall not apply to, or affect, any of the following:

(1) A person who possesses weapons in, or transports weapons into, a court of law to be used as evidence.

(2)(A) A duly appointed peace officer as defined in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2, a retired peace officer with authorization to carry concealed weapons as described in subdivision (a) of Section 12027, a full-time paid peace officer of another state or the federal government who is carrying out official duties while in California, or any person summoned by any of these officers to assist in making arrests or preserving the peace while he or she is actually engaged in assisting the officer.

(B) Notwithstanding subparagraph (A), subdivision (a) shall apply to any person who brings or possesses any weapon specified therein within any courtroom if he or she is a party to an action pending before the court.

(3) A person holding a valid license to carry the firearm pursuant to Article 3 (commencing with Section 12050) of Chapter 1 of Title 2 of Part 4.

(4) A person who has permission to possess that weapon granted in writing by a duly authorized official who is in charge of the security of the state or local government building.

(5) A person who lawfully resides in, lawfully owns, or is in lawful possession of, that building with respect to those

portions of the building that are not owned or leased by the state or local government.

(6) A person licensed or registered in accordance with, and acting within the course and scope of, Chapter 11.5 (commencing with Section 7512) or Chapter 11.6 (commencing with Section 7590) of Division 3 of the Business and Professions Code who has been hired by the owner or manager of the building if the person has permission pursuant to paragraph (5).

(7)(A) A person who, for the purpose of sale or trade, brings any weapon that may otherwise be lawfully transferred, into a gun show conducted pursuant to Sections 12071.1 and 12071.4.

(B) A person who, for purposes of an authorized public exhibition, brings any weapon that may otherwise be lawfully possessed, into a gun show conducted pursuant to Sections 12071.1 and 12071.4.

(c) As used in this section, "state or local public building" means a building that meets all of the following criteria:

(1) It is a building or part of a building owned or leased by the state or local government, if state or local public employees are regularly present for the purposes of performing their official duties. A state or local public building includes, but is not limited to, a building that contains a courtroom.

(2) It is not a building or facility, or a part thereof, that is referred to in Section 171c, 171d, 626.9, 626.95, or 626.10 of this code, or in Section 18544 of the Elections Code.

(3) It is a building not regularly used, and not intended to be used, by state or local employees as a place of residence.

West's Ann.Cal.Penal Code § 171b

9th Circuit No. 99-17551 [DC# 99-4398-MJJ]

IN THE

UNITED STATES COURT OF APPEALS

FOR THE

NINTH CIRCUIT

RUSSELL ALLEN NORDYKE and SALLIE ANN NORDYKE, dba TS TRADE SHOWS, JESS B. GUY, DUANE DARR, WILLIAM J. JONES, DARYL N. DAVIS, TASIANA WERTYSCHYN, JEAN LEE, TODD BALTES, DENNIS BLAIR, R.L. (Bob) ADAMS, ROGER BAKER, MIKE FOURNIER and VIRGIL McVICKER,

Plaintiffs-Appellants,

vs.

MARY V. KING, GAIL STEELE, WILMA CHAN, KEITH CARSON, SCOTT HAGGERTY, THE COUNTY OF ALAMEDA, and THE COUNTY OF ALAMEDA BOARD OF SUPERVISORS,

Defendants-Appellees.

APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA

MOTION TO STRIKE PORTIONS OF APPELLANTS' EXCERPTS OF RECORD AND REFERENCES IN APPELLANTS' OPENING BRIEF TO SUCH PORTIONS

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MOTION TO STRIKE PORTIONS OF APPELLANTS' EXCERPTS OF RECORD AND REFERENCES IN APPELLANTS' OPENING BRIEF TO SUCH PORTIONS

Pursuant to Rules 27 and 10 of the Federal Rules of Appellate Procedure (F.R.A.P.), Circuit Rule 27, and *Kirshner v. Uniden Corp. of America*, 842 F.2d 1074 (9th Cir. 1988), Defendants-Appellees Mary V. King, Gail Steele, Wilma Chan, Keith Carson, Scott Haggerty, the County of Alameda, and the County of Alameda Board of Supervisors ("County") move this Court to strike portions of Appellants' Excerpts of Record, namely Appellant's Amended Verified Complaint ("Amended Complaint") [Exhibit "C"] and any references in Appellant's Opening Brief to the Amended Complaint on the ground that Appellants have improperly included the Amended Complaint in the Excerpts of Record.

On September 17, 1999 Appellants filed an initial complaint naming Alameda County, the Alameda County Board of Supervisors as a body, and naming each of the individual board members, and challenging the Ordinance on First and Fourteenth Amendment grounds, and seeking

damages and injunctive relief and a declaration based upon a state preemption claim. [Exhibit "A" Docket No. 1] On September 30, 1999, Appellants moved the District Court for a temporary restraining order to enjoin the application of the Ordinance. [Exhibit "A" Docket No. 12] On or about September 28, 1999, the County filed an opposition to the Appellant's motion for a temporary restraining order. [Exhibit "A" Docket No. 29]

On October 28, 1999, the District Court heard arguments on Appellant's motion for a temporary restraining order. On November 3, 1999, the District Court issued its order denying the Appellants' motion for injunctive relief. [Exhibit "B"]

On October 7, 1999, the County filed a motion to dismiss the original complaint. [Exhibit "A" Docket No. 45] Appellants did not file a response to the motion to dismiss, but instead on November 10, 1999, and *after* the District Court's November 3, 1999 denial of Appellants' motion for a temporary restraining order and preliminary injunction, the Nordykes filed an Amended Verified Complaint, adding 12 individual plaintiffs, some allegations and exhibits and switching the order of the fourth and fifth claims. [Exhibit "C"]

As shown more fully below, Appellants improperly rely on their Amended Complaint to support their appeal from the District Court's order denying their motion for injunctive relief. Under F.R.A.P. Rule 10(a), the Record on Appeal consists of the following material:

> "Composition of the Record on Appeal. The following items constitute the record on appeal:
>
> (1) the original papers and exhibits filed in the district court;

(2) the transcript of proceedings, if any, and

(3) a certified copy of the docket entries prepared by the district clerk."

Here, Appellants filed the Amended Complaint with the District Court *after* the District Court issued its order denying the Appellants' motion for a temporary restraining order and preliminary injunction. The Court in *Kirshner v. Uniden Corp. of America*, 842, F.2d 1074, 1077 (9th Cir. 1988) held that *"[p]apers submitted to the district court after the ruling that is challenged on appeal should be stricken from the record on appeal." Id.* at 1077-1078 (emphasis added) [quoting *United States v. Walker*, 601 F.2d 1051, 1054-1055 (9th Cir. 1979) (" 'We are here concerned only with the record before the trial judge *when his decision was made.*' ") (italics in case); citing *Heath v. Helmick*, 173 F.2d 156, 156-157 (9th Cir. 1949) ("striking from record on appeal papers that were filed in district court after judgment from which appeal was taken) ("The cause must be tried here upon the record made at the original trial.")]

In *Kirshner*, the contested portions of the Excerpts of Record were served on the court one month after the hearing on the motion and one week after entry of the protective order. *See id.* at 1078. Here, Appellants filed the Amended complaint on November 10, 1999 – twelve days *after* the hearing on the motion for a temporary restraining order and preliminary injunction and *seven days after the District Court issued its order* denying Appellants' motion. Because the Amended Complaint was *not* before the District Court at the time it issued its order, it is not properly part of the record on appeal and should be stricken from the Excerpts of Record. *See Kirshner v. Uniden Corp. of America*, 842, F.2d 1074, 1077 (9th Cir.

1988). Thus, the Court should not give any consideration to the Amended Complaint in adjudicating this appeal. *See id.* at 1078.

Accordingly, the County requests that the Court strike the Amended Complaint from the Excerpts of Record and any such references to the Amended Complaint in support of their Opening Brief.

Dated: March 31, 2000

RICHARD WINNIE
COUNTY COUNSEL,
COUNTY OF ALAMEDA

SAYRE WEAVER
RICHARDS, WATSON
& GERSHON
A Professional Corporation

By: _____
Sayre Weaver
Attorney for Appellees
Mary V. King, Gail Steele,
Wilma Chan, Keith Carson,
Scott Haggerty, the
County of Alameda,
and the County of Alameda
Board of Supervisors

Resp. App. 14

No. S091549

In the Supreme Court
of the
State of California

RUSSELL ALLEN NORDYKE, et al.
Plaintiffs/Appellants/*Petitioners*

v.

MARY V. KING, et al.
Defendants/ Appellees/*Respondents*

On Certification from the
United States Court of Appeals for the Ninth Circuit
Case No. 99-17551

On Appeal from the United States District Court
for the Northern District of California
The Honorable Martin J. Jenkins,
District Judge Presiding
Case No. DC# 99-4398-MJJ

MOTION TO STRIKE PORTIONS OF APPELLANTS'-PETITIONERS' OPENING BRIEF

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MOTION TO STRIKE PORTIONS OF APPELLANTS'-PETITIONERS' OPENING BRIEF; DECLARATION

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT.

Pursuant to Rules 13 and 18 of the California Rules of Court, Defendants-Appellees-Respondents Mary V. King, Gail Steele, Wilma Chan, Keith Carson, Scott Haggerty, the County of Alameda, and the County of Alameda Board of Supervisors (collectively "County") move this Court for an order that Appellants'-Petitioners' Opening Brief ("Petitioners' Opening Brief") be returned and corrected by removal of certain portions of Petitioners' Opening Brief, namely the material cited by Petitioners' in their Opening Brief which is alleged *only* in their Amended Verified Complaint ("Amended Complaint") and the references to their Amended Complaint identified below, **on the grounds that the Amended Complaint had not been filed and was not before the United States District Court for the Northern District of California ("District Court") when it entered the order from which Petitioners appealed to the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit").** *See People v. Brawley* (1969) 1 Cal.3d 277, 294-295 *cert. denied* (1971) 400 U.S. 993. Thus, it is improper for Petitioners to rely on material in the Amended Complaint and to cite to the Amended Complaint to support their Opening Brief.

The portions of the Opening Brief to which the County objects here are:

1. Page 3 of Petitioners' Opening Brief, paragraph 2 beginning with the sentence on Page 3 of Brief, stating "Plaintiff/Appellant JESS B. GUY is an Attorney at Law, shooting enthusiast and collector of used and antique firearms." to the end of that paragraph, ending with the sentence on Page 5 of Brief, stating "All of the foregoing plaintiff/appellants are frequent Exhibitor, Patrons and Vendors at the TS TRADE SHOWS held at the Alameda County Fairgrounds."

2. Page 5 of Petitioners' Opening Brief, first full paragraph as follows: "[ER, Tab 16, Exhibit B];" "[ER, Tab 16, Exhibit A];" "[ER, Tab 16, Exhibit H]."

3. Page 5 of Petitioners' Opening Brief, second full paragraph as follows: "[ER, Tab 16, Exhibit [sic]]."

4. Page 6 of Petitioners' Opening Brief, first full paragraph as follows: "[ER, Tab 16, Exhibit E]."

5. Page 6 of Petitioners' Opening Brief, second full paragraph as follows: "[ER, Tab 16, Exhibit F]."

6. Pages 6 of Petitioners' Opening Brief, last full paragraph as follows: "[ER, Tab 16, Exhibit G]."

7. Page 8 of Petitioners' Opening Brief, last full paragraph as follows: "[ER, Tab 16, page 2];" "[ER, Tab 16, Exhibit E]."

8. Page 37of Petitioners' Opening Brief, first full paragraph as follows: "[ER, Tab 16, Exhibit E]."

9. Page 38 of Petitioners' Opening Brief, second full paragraph as follows: "[Tab 16, pg. 002, ¶ 5]."

10. Page 39 of Petitioners' Opening Brief, first paragraph, as follows: "[ER, Tab 16, Exhibit E];" "[ER, Tab 16, Exhibit D]."

11. Page 40 of Petitioners' Opening Brief, second full paragraph as follows: "[Tab 16, Exhibit K]."

This motion is made pursuant to Rules 13 and 18 of the California Rules of Court and *People v. Brawley* (1969) 1 Cal.3d 277, 294-295 *cert. denied* (1971) 400 U.S. 993 on the grounds that the Amended Complaint was not before the District Court when it entered the Order from which Petitioners appealed and thus is not properly part of the record before this Court. Accordingly, the material found only in the Amended Complaint and all references to the Amended Complaint should be stricken from Petitioners' Opening Brief. This motion is based on this notice, the attached declaration of Sayre Weaver, the attached memorandum of points and authorities, and the record on appeal and briefs on file in this matter.

Dated: March ___, 2001

RICHARD WINNIE
COUNTY COUNSEL,
COUNTY OF ALAMEDA

SAYRE WEAVER
RICHARDS, WATSON &
GERSHON
A Professional Corporation

By: _____
Sayre Weaver
Attorneys for Appellees
Mary V. King, Gail
Steele, Wilma Chan,
Keith Carson, Scott
Haggerty, the County of
Alameda, and the
County of Alameda
Board of Supervisors

MEMORANDUM OF POINTS AND AUTHORITIES

Pursuant to Rules 13 and 18 of the California Rules of Court and *People v. Brawley* (1969) 1 Cal.3d 277, 294-295 *cert. denied* (1971) 400 U.S. 993, the County seeks an order requiring Petitioners to correct their Opening Brief by removing the material in their Brief which is alleged *only* in their Amended Verified Complaint ("Amended Complaint") together with all references to the Amended Complaint on the grounds that the Amended Complaint was not before the United States District Court when it entered the Order from which Petitioners have appealed. This motion seeks to limit Petitioners' Opening Brief to evidence before the District Court when it entered the

order from which Petitioners appealed to the Ninth Circuit.

In the Ninth Circuit, the County also moved to strike the portions of Appellants-Petitioners' Excerpts of Record designating the Amended Complaint as part of the Record [Excerpts of Record, Tab 16] and portions of Appellants-Petitioners' Opening Brief citing to the Amended Complaint. The Ninth Circuit Court of Appeals never ruled on the County's motion to strike. A true and correct copy of the County's motion to strike filed in the Ninth Circuit is attached here as Exhibit "1." [Declaration of Sayre Weaver, ¶ 3 and Exhibit "1" thereto]

On September 17, 1999 Plaintiffs Russell Allen Nordyke and Sallie Ann Nordyke, dba TS Trade Shows filed their original complaint, naming Alameda County, the Alameda County Board of Supervisors as a body, and naming each of the individual board members, and challenging the Ordinance on First and Fourteenth Amendment grounds, and seeking damages and injunctive relief and a declaration based upon a state preemption claim. No other parties appeared as plaintiffs in the original complaint. [Decl. of Sayre Weaver at ¶ 4 and Exhibit "2" thereto (Docket # 1)] On September 30, 1999, Petitioners moved the District Court for a temporary restraining order to enjoin the application of the Ordinance. [Decl. of Sayre Weaver at ¶ 4 and Exhibit "2" thereto (Docket # 12)] On or about September 28, 1999, the County filed an opposition to the Petitioners' motion for a temporary restraining order. [Decl. of Sayre Weaver at ¶ 4 and Exhibit "2" thereto (Docket # 29)]

On October 28, 1999, the District Court heard arguments on Petitioner's motion for a temporary restraining

order. On November 3, 1999, the District Court entered its order denying Petitioners' motion for a temporary restraining order. [Decl. of Sayre Weaver at ¶ 5 and Exhibit "3" thereto]

On October 7, 1999, the County filed a motion to dismiss the original complaint. [Decl. of Sayre Weaver at ¶ 4 and Exhibit "2" thereto (Docket # 45)] Petitioners did not file a response to the motion to dismiss, but instead on November 10, 1999, and *after* the District Court's November 3, 1999 denial of Petitioners' motion for a temporary restraining order and preliminary injunction, Petitioners filed an Amended Verified Complaint, adding 12 individual plaintiffs (which plaintiffs are referred to in Petitioners' Opening Brief before this Court), some allegations and exhibits and switching the order of the fourth and fifth claims. [Decl. of Sayre Weaver at ¶ 6 and Exhibit "4" thereto]

Here, Petitioners filed the Amended Complaint with the District Court *after* the District Court entered its order denying the Petitioners' motion for a temporary restraining order and preliminary injunction – the order they appealed from to the Ninth Circuit. Specifically, Petitioners filed their Amended Complaint on November 10, 1999 – twelve days *after* the hearing on the motion for a temporary restraining order and preliminary injunction and *seven days after the District Court entered its order* denying their motion. Because the Amended Complaint was not presented to the District Court and is not properly part of the record on appeal, this Court cannot consider it. *See Brawley* 1 Cal.3d 277, 294-295 (rejecting defendant's request to augment the record on appeal to include the copies of the complaint and arrest warrant because "[t]he complaint and arrest warrant were not before the trial court, and it

is an elementary rule that ordinarily matters not presented to the trial court and hence not a proper part of the record on appeal will not be considered on appeal"); *People v. Pearson* (1969) 70 Cal.2d 218 (explaining that material not before the trier of fact is not part of record on appeal from judgment and thus the court on appeal is not authorized to augment the record with material not before the trier of fact). *See also McConnell v. All-Coverage Ins. Exch.* (1964) 229 Cal.App.2d 735, 749 (explaining that the reviewing court reviews the orders of the trial court on the "record then before the trial court. If events occur, subsequent to the issuance of the orders appealed from, which render inequitable or improper the enforcement of such orders, appellant's remedy is by appropriate motion in the trial court after the remand to it.").

Accordingly, the County objects to and seeks an order requiring Petitioners to strike the material set forth below from Petitioners' Opening Brief and file a corrected brief with this Court or in the alternative that the Court correct Petitioners' Opening Brief by interlineation or enter an order indicating it has disregarded the material set forth below from Petitioners' Opening Brief :

Portions of Petitioners' Opening Brief contained only in Amended Complaint which the County moves to strike:	Grounds for Motion to Strike:
1. Page 3 of Petitioners' Opening Brief, paragraph 2 beginning with the sentence on Page 3 of Brief, stating "Plaintiff/Appellant JESS B. GUY is an Attorney at Law, shooting enthusiast and	1. These plaintiffs are identified only in the Amended Verified Complaint [ER, Tab 16] – a document not before the District Court when it entered its Order from

collector of used and antique firearms." to the end of that paragraph, ending with the sentence on Page 5 of Brief, stating "All of the foregoing plaintiff/appellants are frequent Exhibitor, Patrons and Vendors at the TS TRADE SHOWS held at the Alameda County Fair-grounds."	which Petitioners have appealed. The Amended Complaint is not properly part of the record on appeal. *See Brawley, supra.*

With reference to the following citations to the Amended Complaint in support of Petitioner's Opening Brief, the facts cited are also set forth in the Original Complaint [Excerpts of Record, Tab 1] or are otherwise contained in the record. However, Petitioners' citation to the Amended Complaint in support of these facts is improper because the Amended Complaint was not before the District Court when it entered its Order from which Petitioners have appealed. Accordingly, the County objects to and moves to strike the references to the Amended Complaint as set forth fully below:

References in Petitioners' Opening Brief to Amended Complaint which the County moves to strike:	Grounds for Motion to Strike:
1. Page 5 of Petitioners' Opening Brief, first full paragraph as follows: "[ER, Tab 16, Exhibit B];" "[ER, Tab 16, Exhibit A];" "[ER, Tab 16, Exhibit H]."	1. These references are to the Amended Verified Complaint [ER, Tab 16] – a document not before the District Court when it entered its Order from which Petitioners have appealed. The Amended

	Complaint is not properly part of the record on appeal. *See Brawley, supra*. Petitioners should have cited to the Original Complaint.
2. Page 5 of Petitioners' Opening Brief, second full paragraph as follows: "[ER, Tab 16, Exhibit [sic]]."	2. This reference is to the Amended Verified Complaint [ER, Tab 16] – a document not before the District Court when it entered its Order from which Petitioners have appealed. The Amended Complaint is not properly part of the record on appeal. *See Brawley supra*.
3. Page 6 of Petitioners' Opening Brief, first full paragraph as follows: "[ER, Tab 16, Exhibit E]."	3. This reference is to the Amended Verified Complaint [ER, Tab 16] – a document not before the District Court when it entered its Order from which Petitioners have appealed. The Amended Complaint is not properly part of the record on appeal. *See Brawley, supra*. Petitioners should have cited to the Original Complaint.
4. Page 6 of Petitioners' Opening Brief, second full paragraph as follows: "[ER, Tab 16, Exhibit F]."	4. This reference to the Amended Verified Complaint [ER, Tab 16] – a document not before the District Court when it entered its Order that Petitioners have appealed.

	The Amended Complaint is not properly part of the record on appeal. *See Brawley, supra*. Petitioners should have cited to evidence in the Record on the Amendment of the Ordinance [ER, T13 at 6-11].
5. Pages 6 of Petitioners' Opening Brief, last full paragraph as follows: "[ER, Tab 16, Exhibit G]."	5. This reference is to the Amended Verified Complaint [ER, Tab 16] – a document not before the District Court when it entered its Order from which Petitioners have appealed. The Amended Complaint is not properly part of the record on appeal. *See Brawley, supra*. Petitioners should have cited to the Original Complaint.
6. Page 8 of Petitioners' Opening Brief, last full paragraph as follows: "[ER, Tab 16, page 2];" "[ER, Tab 16, Exhibit E]."	6. These references are to the Amended Verified Complaint [ER, Tab 16] – a document not before the District Court when it entered its Order from which Petitioners have appealed. The Amended Complaint is not properly part of the record on appeal. *See Brawley, supra*. Petitioners should have cited to the Original Complaint.

7. Page 37of Petitioners' Opening Brief, first full paragraph as follows: "[ER, Tab 16, Exhibit E]."	7. This reference is to the Amended Verified Complaint [ER, Tab 16] – a document not before the District Court when it entered its Order from which Petitioners have appealed. The Amended Complaint is not properly part of the record on appeal. *See Brawley, supra.* Petitioners should have cited to the Original Complaint.
8. Page 38 of Petitioners' Opening Brief, second full paragraph as follows: "[Tab 16, pg. 002, ¶ 5]."	8. This reference is to the Amended Verified Complaint [ER, Tab 16] – a document not before the District Court when it entered its Order from which Petitioners have appealed. The Amended Complaint is not properly part of the record on appeal. *See Brawley, supra.* Petitioners also cited to the Original Complaint at [ER, Tab 1 at 3, ¶ 10] and should have cited only to this evidence in the Original Complaint.
9. Page 39 of Petitioners' Opening Brief, first paragraph, as follows: "[ER, Tab 16, Exhibit E];" "[ER, Tab 16, Exhibit D]."	9. These references are to the Amended Verified Complaint [ER, Tab 16] – a document not before the District Court when it entered its Order from which Petitioners have

	appealed. The Amended Complaint is not properly part of the record on appeal. *See Brawley, supra*. Petitioners should have cited to the Original Complaint.
10. Page 40 of Petitioners' Opening Brief, second full paragraph as follows: "[Tab 16, Exhibit K]."	10. These references are to the Amended Verified Complaint [ER, tab 16] – a document not before the District Court when it entered its Order that Petitioners have appealed. The Amended Complaint is not properly part of the record on appeal. *See Brawley, supra*. Petitioners should have cited to the Original Complaint.

For the above reasons, the County seeks an order requiring Petitioners to strike the material set forth below from Petitioners' Opening Brief and file a corrected brief with this Court or in the alternative that the Court correct Petitioners' Opening Brief by interlineation or enter an order indicating it has disregarded the material set forth above from Petitioners' Opening Brief.

Dated: March ___, 2001

RICHARD WINNIE
COUNTY COUNSEL,
COUNTY OF ALAMEDA

SAYRE WEAVER
RICHARDS, WATSON &
GERSHON
A Professional Corporation

By: _____
Sayre Weaver
Attorneys for Appellees
Mary V. King, Gail Steele,
Wilma Chan, Keith Carson,
Scott Haggerty, the
County of Alameda, and
the County of Alameda
Board of Supervisors

No. 99-17551 [DC# CV 99-4389-MJJ]

IN THE
UNITED STATES COURT OF APPEAL
FOR THE NINTH CIRCUIT

RUSSELL ALLEN NORDYKE; et al.,
Plaintiffs-Appellants,

vs.

MARY V. KING; et al.,
Defendants-Appellees.

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

PLAINTIFF/APPELLANTS' MOTION TO CONDUCT SUPPLEMENTAL BRIEFING ON CONSTITUTIONAL ISSUES

Donald E.J. Kilmer, Jr.
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Counsel for Plaintiff-Appellants

MOTION TO SUBMIT SUPPLEMENTAL BRIEFING

Plaintiff/Appellants hereby apply to this Court for permission to file Supplemental Briefs on the Federal Constitutional issues in the above-entitled action. The reasons for the request are as follows:

1. In its September 12, 2000 Order certifying a question to the California Supreme Court, this Court ordered a stay of these proceedings. Therefore, the parties were precluded from applying to this Court to conduct supplemental briefing on important post-submission issues that have been raised by events outside the scope of this litigation.

2. In its July 26, 2002 Order inviting the parties to file simultaneous supplemental brief, the court limited the issues to be address to "the impact of the California Supreme Court's answer to the question certified on September 12, 2000." A fair reading of that order does *not* invite the parties to brief any other issues.

3. As noted in Plaintiff/Appellants' Supplemental Brief, a wholly new legal issue, with respect to Second Amendment standing issues, has arisen since submission of this case to this panel and the California Supreme Court's decision. On June 10, 2002, the U.S. Supreme Court denied certiorari in the case of *Emerson v. United States*, 270 F.3d 203 (5th Cir. 2001); leaving in place a decision that is somewhat in conflict with decisions in this Circuit. Furthermore, in its brief opposing certiorari before the U.S. Supreme Court, the Solicitor General and Attorney General, clarified the United States Government's position with respect to Second Amendment standing issues.

Though not raised the parties, the issues is fairly before this Court based upon the District Court's *Order Denying Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction.* See: page; 13, line 21 *et seq.* Whatever Second Amendment rights the Plaintiff/Appellants might have – when coupled with the First Amendment issues already before this Court – could end up being dispositive of the case.

4. Several cases have been decided by the United States Supreme Court and the Ninth Circuit Court of Appeals that may have important ramifications on the Federal Constitutional Issues still pending before this Court. The following is a partial list of such cases:

   A. *Watchtower Bible and Tract Society of New York, Inc., et al., Petitioners vs. Village of Stratton et al.* (June 17, 2002) ___ U.S. ___, 122 S. Ct. 2080; 153 L. Ed. 2d 205.

   B. *Tommy G. Thompson, Secretary of Health and Human Services, et al., Petitioners vs. Western States Medical Center et Al.* (April 29, 2002) ___ U.S. ___, 122 S. Ct. 1497; 152 L. Ed. 2d 563.

   C. *John D. Ashcroft, Attorney General, et al., Petitioners vs. the Free Speech Coalition et al.* (April 16, 2002) ___ U.S. ___, 122 S. Ct. 1389; 152 L. Ed. 2d 403.

   D. *Good News Club, et al. vs. Milford Central School* (June 11, 2001) 533 U.S. 98; 121 S. Ct. 2093; 150 L. Ed. 2d 151.

   E. *Venetian Casino Resort vs. Clark County, et al* (July 12, 2001) 257 F.3d 937. Certiorari Denied March 4, 2002, Reported at; 2002 U.S. LEXIS 1402.

F. *Gary Edwards vs. City of Coeur D'alene et al.* (August 21, 2001) 262 F.3d 856.

G. *Mae Culbertson vs. Oakridge School District, et al.* (August 7, 2001) 258 F.3d 1061.

5. The parties concentrated on the preemption questions in their principal briefs. In their 51 page, *Opening Brief*, Plaintiff/Appellants devoted only 10 pages to the First Amendment issues. In their 45 page, *Brief of Appellees*, the Defendant/Appellees devoted only 12 pages to the First Amendment issues. In their *Reply Brief*, Plaintiff/Appellants devoted only 5 pages to the First Amendment issues. This Court's certification of the preemption issues to the California Supreme Court, makes it readily apparent that this Court and the litigants were relying heavily on the preemption issues to resolve the case. Now that First Amendment issues predominate, it makes sense to order supplemental briefing on those issues.

After the reply brief has been filed, no further briefs are allowed absent court permission. Thus, a party wishing to file a supplemental brief must file a motion with the court for permission to do so. [See FRAP Rule 28(c)]

Supplemental authority need not announce a departure from established authority. Any relevant authority coming to counsel's attention after the brief is filed or argument is made may be brought to the court's attention. *Gulden v. Crown Zellerbach Corp.*, 890 F.2d 195, 197, fn. 2 (9th Cir. 1989)

It is within this Court's power to order the parties to file supplemental briefs on the First Amendment issues still pending before this Court. If the Court is inclined to

agree with the Plaintiff/Appellants that further briefing is warranted, they hereby request an order so stating.

Date: August 19, 2002

Respectfully Submitted,

/s/ Donald Kilmer
Donald E. J. Kilmer, Jr.
Attorney for
Plaintiff/Appellants

Re: *Nordyke v. King* U.S. Ninth Circuit Case No. 99-17551
U.S. District Court, Case No. C 99 04389

PROOF OF SERVICE

I, Yeaser Ghalib, declare that I am employed in the City of San Jose, County of Santa Clara, State of California. I am over the age of 18 years and not a party to this action; my business address is: 1261 Lincoln Avenue, Suite 111; San Jose, California 95125-3030

On August 19, 2002, I served the following documents:

PLAINTIFF/APPELLANTS' MOTION TO CONDUCT SUPPLEMENTAL BRIEFING ON CONSTITUTIONAL ISSUES

on the following interested party(s) in this action:

Sayre Weaver, Esq.
RICHARDS WATSON & GERSHON
Number One Civic Center Circle
P.O. Box 1059
Brea California 92822-1059

Richard Winnie, Esq.
ALAMEDA COUNTY COUNSEL
1221 Oak Street, Suite 463
Oakland, California 94612-4296

VIA Federal Express

[XX] By contracting with a commercial carrier for delivery to the address listed above within three (3) calendar days from the date this declaration was executed, in accordance with Federal Rule of Appellate Procedure 25(a)(2)(B)(i), (ii). Said documents were also dispatched for filing with the Clerk of the Court for delivery by a third party commercial carrier pursuant to FRAP 25(a)(2)(B)(i), (ii). This was done by placing the appropriate number of copies in a prepaid Federal Express envelope, and placing them for pickup on before close of business on August 19, 2002.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on August 19, 2002, at San Jose, California.

/s/ Yeaser M. Ghalib
Yeaser M. Ghalib

No. 99-17551 [DC# CV 99-4389-MJJ]

IN THE
UNITED STATES COURT OF APPEAL
FOR THE NINTH CIRCUIT

RUSSELL ALLEN NORDYKE; et al.,
Plaintiffs-Appellants,

vs.

MARY V. KING; et al.,
Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA MARTIN J. JENKINS, DISTRICT JUDGE, PRESIDING

PETITION FOR REHEARING *EN BANC* AND PANEL REHEARING

ORIGINAL PANEL:
ARTHUR L. ALARCÓN, DIARMUID F. O'SCANNLAIN AND RONALD M. GOULD, CIRCUIT JUDGES

Donald E. J. Kilmer, Jr.
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I. INTRODUCTION AND STATEMENT OF COUNSEL

Plaintiff-Appellants hereby seek rehearing *en banc* of the February 19, 2003 Panel decision (Alarcón, A., O'Scannlain, D. and Gould, R.) concerning an issue of national significance arising under the Second Amendment to the United States Constitution. The Panel held that it was foreclosed from reaching the merits of *Plaintiff-Appellant's* challenge to a local ordinance based upon this Circuit's holding in *Hickman v. Block*, 81 F.3d 98 (9th Cir. 1996) that individuals lack standing to seek any protections under the Second Amendment.

Plaintiff-Appellants contend that a rehearing by the full court is necessary because the issues raised are of exceptional importance. For example: Judge Gould found that the controversy over the individual rights interpretation of the Second Amendment implicates issues of national security and preservation of the republic. With respect to the facts presented by this case – gun shows are events that take place throughout the rest of the country.

Furthermore, gun show legislation is currently pending in the United States Congress.[1] A further illumination of the constitutional boundaries of the "right to keep and bear arms" by the judiciary can only add substance to the policy considerations that will be addressed by executive and legislative branches of the federal government.

Plaintiff-Appellants would also note that current Ninth Circuit law, as set forth in *Hickman v. Block, supra; Silveira v. Lockyer*, 312 F.3d 1052 (9th Cir.); and *Fresno Rifle & Pistol Club, Inc. v. Van de Kamp*, 965 F.2d 723 (9th Cir. 1992) directly conflicts with an opinion out of the Fifth Circuit Court of Appeals: *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001). We also assert that current Ninth Circuit law in this area conflicts with broad principles articulated by the U.S. Supreme Court.

II. IMPORTANCE OF THE ISSUE

The question *Plaintiff-Appellants* raise for *en banc* review is whether the Second Amendment guarantees an individual right. We contend that every law abiding, responsible adult has the right to acquire and possess ordinary small arms. That the question is one of major importance for the entire nation should be obvious.

In his concurring opinion Judge Ronald M. Gould found that the individual rights version of: *"The Second Amendment serves at least the following two key purposes: (1) to protect against external threats of invasion; and (2) to guard against the internal threat our republic could*

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[1] McCain-Lieberman Gun Show Bill – SB 890.

degenerate to tyranny." Nordyke v. King, 319 F.3d 1185 (9th Cir. 2003).

Judge Gould described in practical terms how the individual rights doctrine could fulfill those purposes. He also noted that *Silveira, supra* failed to adequately describe how the state's rights theory could accomplish even the limited constitutional objectives, set forth in the *Silveria* opinion, of providing a check and/or balance to a standing federal army.

> The *Silveira* majority takes the position that the Framers' concerns to check the possibility of a Federal government tyranny are sufficiently answered by reading the Second Amendment merely to ensure that the states could not be barred from funding state-organized militia. *Silveira*, 312 F.3d at 1085. I disagree. The Second Amendment cannot properly be interpreted to entrust the freedom of the people to the premise that state governments would arm a self-reliant people and protect the people against a federal tyranny. The practical concept of militia contemplates an armed citizenry capable of rising up, with what arms they hold or can find, to defeat, resist or at minimum delay an invader until more organized power can be marshalled. The likelihood of broad resistance from an armed citizenry is a deterrent to any would be invader. Equally important, the practical concept of militia, embracing an armed citizenry, stands to deter risk of government degradation to tyranny. This concept is weakened by *Silveira's* premise that the citizens could rely on their states to be an arsenal and repository for arms, and otherwise have no right.
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> Judge Gould's Concurring Opinion
> *Nordyke v. King, supra*

The relationship between the federal government, and the states regarding military issues has previously been found to be of manifest importance[2]. *Plaintiff-Appellants'* case raises similar issues regarding the relationship among the federal government, the states and ***individuals,*** and is therefore also of manifest importance.

III. NINTH CIRCUIT LAW CONFLICTS WITH HOLDINGS FROM THE UNITED STATES SUPREME COURT, ANOTHER CIRCUIT AND FINDINGS BY THE UNITED STATES CONGRESS

A. Overview

Plaintiff-Appellants want to reiterate a point made before the *Nordyke* panel, we are *not* seeking wholesale invalidation of all state and local laws regulating firearms. An individual rights interpretation of the Second Amendment would not extend to criminals, children, the mentally unbalanced and persons subject to domestic violence restraining orders.[3] Arguably many of the gun laws in this state would not violate the Amendment *per se*.[4] [See, e.g., *Robertson v. Baldwin*, 165 U.S. 275, 281-282 (1897)]

Ninth Circuit Second Amendment Jurisprudence – which is based upon a "collective and/or states' rights" theory – conflicts with another Circuit's "individual rights" interpretation,

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[2] *Perpich v. Department of Defense*, 496 U.S. 334, 339 (1990).

[3] *United States v. Emerson*, 270 F.3d 203, 261 (5th Cir. 2001)

[4] See, e.g., Don B. Kates, "Handgun Prohibition and the Original Meaning of the Second Amendment", 82 MICH. L. REV. 203, 258-266 (1983) detailing gun controls that are valid under the individual right view of the Second Amendment.

and with Supreme Court opinions. As *Nordyke* states: "*We recognize that our sister circuit engaged in a very thoughtful and extensive review of both the text and historical record surrounding the enactment of the Second Amendment. And if we were writing on a blank slate, we may be inclined to follow the approach of the Fifth Circuit in Emerson.*" *Nordyke v. King, supra*. And as Judge Gould states in the concurrence:

> I join the court's opinion, and write to elaborate that *Hickman v. Block*, 81 F.3d 98 (9th Cir. 1996), was wrongly decided, that the remarks in *Silveira v. Lockyer*, 312 F.3d 1052 (9th Cir. 2002), about the "collective rights" theory of the Second Amendment are not persuasive, and that we would be better advised to embrace an "individual rights" view of the Second Amendment, as was adopted by the Fifth Circuit in *United States v. Emerson*, 270 F.3d 203, 260 (5th Cir. 2001), consistent with *United States v. Miller*, 307 U.S. 174 (1939). We should recognize that individual citizens have a right to keep and bear arms, subject to reasonable restriction by the government. We should also revisit whether the requirements of the Second Amendment are incorporated into the Due Process Clause of the Fourteenth Amendment. [footnotes omitted]

The rest of this brief is – of necessity – a critique of collective rights model set forth in the *Hickman, supra* and *Silveira, supra*. On the issue of 14th Amendment Due Process incorporation, even the *Silveira* panel concluded notwithstanding the standing issues, that the refusal to incorporate various provisions of the Bill of Rights though the 14th Amendment Due Process Clause, based upon the holdings of *United States v. Cruikshank*, 92 U.S. 542

(1876) and *Presser v. Illinois*, 116 U.S. 252 (1886) is based upon a now discredited view. Therefore, if *en banc* review is granted, it will also be necessary to revisit this Circuit's holding in *Fresno Rifle & Pistol Club, Inc. v. Van de Kamp*, 965 F.2d 723 (9th Cir. 1992).

B. History of the Amendment before *Miller*[5]

William Van Alstyne, a major figure in modern constitutional law, has noted:

> In recent years it has been suggested that the Second Amendment protects the 'collective right' of states to maintain militias, while it does not protect the right of 'the people' to keep and bear arms. If anyone entertained [that concept] in the period during which the Constitution and Bill of Rights were debated and ratified, it remains one of the most closely guarded secrets of the eighteenth century, for no known writing surviving from the period between 1787 and 1791 states [that theory].[6]

As Prof. Van Alstyne also notes, the Amendment has "generated almost no useful body of [case] law." Every major figure in American constitutional law who has addressed the Amendment declares it an individual right.[7] Are they all wrong?

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[5] *United States v. Miller*, 307 U.S. 174 (1939).

[6] William Van Alstyne, "The Second Amendment and the Personal Right to Arms", 43 DUKE L. J. 1236, 1243, n. 19 (1994) (emphasis added) quoting from Stephen P. Halbrook, "THAT EVERY MAN BE ARMED": THE EVOLUTION OF A CONSTITUTIONAL RIGHT (1984).

[7] Besides Van Alstyne *supra*, and Justice Story, *infra*, see; Thomas Cooley, The General Principles of Constitutional Law in the United States of America 298 (3d ed. 1898); Sanford Levinson, "The Embarrassing

(Continued on following page)

The very concept of the Amendment as something other than an individual right was unknown to the Founders and the following generations. Beyond the absence of the "collective rights" from the period 1787-91, the theory was equally unknown in the 19th Century.[8] Typical of 19th Century explanations of the Amendment's purposes is Mr. Justice Story's: "*One of the ordinary modes, by which tyrants accomplish their purpose without resistance is, by disarming the people and making it an offense to keep arms.*"[9] Surprisingly, neither *Silveira* nor *Hickman*, nor any other argument for the states' right position even mentions Justice Story's, or the other, 19th Century explanations of the Second Amendment.

Second Amendment", 99 YALE L. J. 637 (1989); Akhil Amar, *The Bill of Rights As a Constitution*, 100 Yale L. J. 1131, 1166 (1991); Leonard W. Levy, ORIGINS OF THE BILL OF RIGHTS 134-35 (1999); Laurence H. Tribe, Vol. 1, 3rd Ed., AMERICAN CONSTITUTIONAL LAW 901-902, n. 221 (2000).

[8] David Kopel, "The Second Amendment in the Nineteenth Century," 1998 BRIG. YOUNG L. REV. 1359.

[9] J. Story, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES 264 (1840; republished, 1893) cited by Prof. Kopel. supra at p. 1393 of 1998 BRIG. YOUNG L. REV. Other 19th Century constitutional exegesis he cites include: P. 1377, St. George Tucker (1803): the Second Amendment enshrines "The right of self defense [which] is the first law of nature."; Pp. 1385-88, William Rawle (1825): the right to arms does not protect the carrying of arms "for an unlawful purpose"; P. 1437 Lysander Spooner (1850): "This right to keep and bear arms implies the right to use them . . . as, for example, in defense of life, liberty, chastity, &c. . . ."; Pp. 1402 and 1469, Francis Lieber (1853) and Joel Tiffany (1868) both: analogizing the Second Amendment to the Third; P.. 1470, Timothy Farrar (1867): analogizing "The right of every person . . . 'to keep and bear arms'" to the rights of trial by jury, habeas corpus, due process and "divers other [rights] recognized by and held under the Constitution"; P. 1476, John Norton Pomeroy (1870): The clause guaranteeing "The right of the people to keep and bear arms . . . is analogous to the [clause] securing freedom of speech and of the press."

Though both the Supreme Court's, and the Founding Fathers', references to the Amendment are very brief, they all portray it as an individual right, usually lumping it together with the rest of the Bill of Rights without suggesting it is any less individual.[10] The Supreme Court, interpreting the phrase "right of the people" in the Fourth Amendment suggested that as used there and in the First and Second Amendments, it denotes rights of individuals.[11] In another case construing a statute punishing those who "carry" arms in connection with drug crimes, both the majority and dissenting opinions equated "carry" arms to the phrase "bear arms".[12]

Last, but scarcely least, the idea of the Amendment guaranteeing state power over the militia flies in the face of an unbroken line of federal case law dating back to 1820. Those cases hold that the states have no power over the militia *vis-a-vis* federal control.[13]

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[10] As to the Founders' references to the right to arms, see Original Meaning, *supra*, 82 MICH. L. REV. 223-4, 235 (quoting James Madison, Fisher Ames, Albert Gallatin and James Monroe) As to Supreme Court references see, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833, 848 (1992) and other cases there cited (using Second Amendment along with First and Fourth Amendments to illustrate personal rights that the Bill of Rights protects against government) and the cases discussed in David B. Kopel, "The Supreme Court's Thirty-Four *Other* Gun Cases: What the Supreme Court Has Said About the Second Amendment", 18 ST. LOUIS U. PUBLIC L. REV. 99 (1999).

[11] *U.S. v. Verdugo-Urquidez*, 494 U.S. 259, 266 (1990).

[12] *Muscarello v. U.S.*, 525 U.S. 125, (1998).

[13] Inter alia, *Houston v. Moore*, 18 U.S. 1, 24 (1820) (federal militia legislation preempts state), *Martin v. Mott*, 25 U.S. 19 (1827) (president's power to call militia from state control into federal service), *Selective Draft Law Cases*, 245 U.S. 366, 383 (1918) (Congress has authority to abolish states militia by bodily incorporating them into federal army), *Perpich v. Department of Defense*, 496 U.S. 334 (1990) (state militias may be called into federal service over state objection because federal authority over the militia is paramount).

C. *United States v. Miller*

The only Supreme Court case to consider the Second Amendment at any length was *United States v. Miller, supra* which held an indictment should not have been dismissed on the blanket theory that the National Firearms Act violated the Amendment *ipso facto*. Neither of the defendants were, or claimed to be, members of the militia. Nor did the Court suggest they needed to allege such a status to challenge the statute under the Amendment. Instead, the *Miller* Court held that the validity of a law regulating sawed-off shotguns depends on whether they are the kind of firearms the Second Amendment protects individuals in possessing.

Dealing with the challenge on its merits, the Court held the Amendment guarantees possession of military-type weapons only. This is based on the Amendment's reference to a militia (which the Court expressly recognized included virtually the whole male population "bearing arms supplied by themselves"[14]). Having fixed on this military-weapon standard, the Court reversed the dismissal of the indictment because (for obvious reasons) there had been no trial to establish whether a sawed off shotgun is a military weapon, and the Court was not prepared to take judicial notice of that fact.[15]

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[14] 307 U.S. at 179: "The signification attributed to the term 'militia' appears from the debates in the Convention, the history and legislation of the colonies and the states, and the writings of approved commentators . . . [:] all males physically capable of acting in concert for the common defense. . . . [O]rdinarily when called for service these men were expected to appear bearing arms *supplied by themselves* and of the kind in common use at the time." Emphasis added.

[15] 307 U.S. at 178.

Miller reached this basically individual right result even though the individual right view was not argued to the Court. The matter went up from the trial court on the government's appeal and neither defendant appeared above. The only brief filed was the government's. Even more significant, the states' right-collective right view was actually presented to the Court in the brief for the United States[16] – yet the Court did not even address that argument, rather the Court cited 19th Century cases construing the right to arms provisions as an individual right.[17]

D. Conflicting Post-*Miller* Court of Appeals Cases

The states' rights theory appeared in a First Circuit case which only "followed" *Miller* chronologically but expressly refused to follow it doctrinally, asserting that *Miller* had not meant to establish a standard for future cases. *Cases v. U.S.*, 131 F.2d 916, 922 (1st Cir.1942).

Cases set the pattern for future circuit court cases, that adopted the states' right theory without any discussion of the historical, textual or legal points we raise herein. What followed was a series of terse circuit court cases that purport to follow a *Miller* "standard" without recognizing that they are instead following *Cases* which

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[16] It "argued that the [Second Amendment] right was a collective one that [only] protected the people when carrying arms as members of the state militia." Vol. 1, R. Cottrol, GUN CONTROL AND THE CONSTITUTION, xxvii (Introduction) (NY Garland, 1993).

[17] 307 U.S. at 179. For discussion of the cited cases under the unquestionably individual right in the Tennessee Constitution and their relation to *Miller* and the Second Amendment, see Glenn H. Reynolds, "The Right to Keep and Bear Arms Under the Tennessee Constitution," 61 TENN. L. REV. 647, 661 *et seq.* (1994).

expressly departed from *Miller*. Some of these cases involve – and state nothing more than – the unquestionably correct conclusion that felons have no rights under the Second Amendment.[18] On several occasions, individual judges have expressed disagreement with the states' right view.[19]

The *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001) held that the Amendment protects an individual right, devoting more reasoning and analysis to the matter than all the prior circuit court opinions combined. (One judge dissented, on the erroneous basis that *Emerson's* Second Amendment discussion is dicta.[20])

E. Conflicting Ninth Circuit Decisions

Apparently the first[21] Ninth Circuit case to consider the issue was *Marchese v. California*, 545 F.2d 645, 646

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[18] See *eg.*, *U.S. v. Toner*, 728 F. 2d 115, 129 (2nd Cir. 1984), *Marchese v. California*, 545 F. 2d 645, 646 (9th Cir. 1976), *United States v. Warin*, 530 F.2d 103, 106 (6th Cir. 1976), *U.S. v. Johnson*, 497 F. 2d 548, 550 (4th Cir. 1974)

[19] *United States v. Breier*, 827 F.2d 1366 (9th Cir. 1987) (Noonan, J. dissenting from a denial or rehearing *en banc*), *United States v. Hale*, 978 F.2d 1016, 1021 (8th Cir. 1992) (Beam, J. concurring), *United States v. Gomez*, 92 F.3d 770, 774, n. 7 (9th Cir. 1996) (Kozinski, J.).

[20] Even if it is not strictly necessary to deciding the case, language in an opinion that is clearly intended to dispose of a contention raised by a party is holding, not dictum. *Six Companies of California v. Joint Highway Dist.* (1941) 311 U.S. 180, 187, *Blair v. U.S.*, 147 F.2d 840, 849 (8th Cir. 1945).

[21] Although it should be noted that *Robertson v. Baldwin, supra* arose out of an appeal from the Northern District of California. This is significant because *Robertson* is a U.S. Supreme Court case that implicitly recognized the "right to keep and bears arms" as an individual right.

(9th Cir. 1976) which rejected the individual right view in a single sentence citing some of the other terse, circuit court cases. The next case was *Fresno Rifle & Pistol Ass'n. v. VanDeKemp*, 965 F.2d 723 (9th Cir. 1992). The panel in that case acknowledged the individual vs. states' right debate as an open question, but refused to decide the issue. [*Fresno*, at 729] Instead the *Fresno* panel, disposed of the case based on 19th Century Supreme Court case law holding that the Second Amendment restrains only the federal government, not the states. [*Fresno,* at 729 *et seq.*] But this was clearly erroneous because the opinion recognized the 19th Century case law[22] addressed a different (though analogous) point.[23]

Then *Hickman v. Block*, 81 F.3d 98, 102 (9th Cir. 1996) concluded that individuals do not even have standing to raise a Second Amendment claim because that Amendment "guarantees [only] the right of the states to maintain [an] armed militia. . . ." It is ironic that

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[22] Those cases held that in and of themselves none of the Bill of Rights apply against the states – a point that is still good law today. What the opinion recognizes those cases did not address is 14th Amendment incorporation against the states (965 F.2d 730-31). There were 19th Century cases rejecting that theory as well, but they are, of course, no longer good law.

[23] Compare *Fresno* at p. 730 to Michael K. Curtis, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 104 (Duke, 1986) "the rights that Republicans in the Thirty-ninth Congress relied on as absolute rights of the citizens of the United States were the right[s] to freedom of speech . . . due process . . . and to bear arms." See pp. 52, 53, 56, 72, 88, 140-1 and 164. See also Van Alstyne, supra, 43 DUKE L. J. 1251-53 (1994), Richard L. Aynes, "On Misreading John Bingham and the Fourteenth Amendment", 103 YALE L. J. 57, 84, 98 (1993); Akhil Reed Amar, "The Bill of Rights and the Fourteenth Amendment", 101 YALE L. J. 1193, 1205-11, 1261-2 (1992).

Hickman sees this conclusion as deriving from *U.S. v. Miller*, and following cases, since it exactly reverses what *Miller* actually did as to standing. Recall that the *Miller* Court entertained a Second Amendment challenge from two men who made no claim to membership in the militia.

In the wake of the 5th Circuit's *Emerson, supra* decision, a panel of this Court sought to shore up the states' rights position in *Silveira v. Lockyer*, 312 F.3d 1052 (9th Cir. 2002), discussed *infra*. This position was disavowed by the *Nordyke* panel.

F. Inadequacies of *Silveira's* Analysis

Current Circuit opinions refuse to consider Second Amendment issues on the basis that the Circuit position is fixed by *Hickman*.[24] We respectfully submit that rehearing *en banc* is required to either: a) repudiate the states' right view, or b) establish an intellectually valid basis for it by addressing the following problems Silveria fails to adequately deal with (or ducks entirely):

1. The mechanics of the standing issue, unstated in *Hickman*, and vaguely expressed in *Silveira*, necessarily implies that any litigation brought to remedy a breach of the right "to keep and bear arms" can only be addressed through a suit brought by the states on behalf of "the people." In effect, the states must assume the role of *parens patriae* on

[24] See, e.g., *United States v. Hinostroza*, 297 F.3d 924, 927 (9th Cir. 2002); *United States v. Hancock*, 231 F.3d 557 (9th Cir. 2000); *United States v. Mack*, 164 F.3d 467 (9th Cir. 1999); *San Diego County Gun Rights Comm. v. Reno*, 98 F.3d 1121 (9th Cir. 1996); and *United Stats v. Gomez*, 92 F.3d 770 (9th Cir. 1996) [*contra:* fn. 7]

behalf their citizens. This is contrary to doctrines articulated by the U.S. Supreme Court. *"The first eight Amendments to the Constitution set forth self-executing prohibitions on governmental action, and this Court has had primary authority to interpret those Prohibitions."* [*City of Boerne v. Flores*; 521 U.S. 507, 524 (1997)] Construing the "self-executing" provisions of the 15th Amendment in *South Carolina v. Katzenbach*; 383 U.S. 301, 324 (1966), the U.S. Supreme Court stated: "*Nor does a State have standing as the parent of its citizens to invoke these constitutional provisions against the Federal Government, the ultimate parens patriae of every American citizen. Massachusetts v. Mellon*, 262 U.S. 447, 485-486; *Florida v. Mellon*, 273 U.S. 12, 18."

2. Neither *Silveira*, nor any other decision advancing the states' right theory mentions – much less reconciles – the Supreme Court's holdings that states have no power over the militia as against federal control. (See fn. 13 *supra*.)

3. *Silveira* offers no reconciliation of the Amendment's use of the term of art "right of the people" used in several other parts of the Bill of Rights. Are we to believe that the First Congress used "right of the people" to mean a right of individuals in the First Amendment, but 16 words later in the Second it means a right of the states, but 26 words later in the Fourth it means a right of individuals?

4. *Silveira* offers no answer to *Emerson's* point that, "*As used throughout the Constitution,*

the people have 'powers' or 'rights,' but federal and state governments have 'powers' or 'authority, never 'rights.'" *U.S. v. Emerson*, 270 F.3d at 227.

5. Then there are the Ninth and Tenth Amendments which specifically provide illumination with respect to people's ***rights and powers*** and the states' mere ***powers***.[25]

6. *Silveira* gratuitously assumes an inconsistency between the Amendment's intent of guaranteeing a right to people and of protecting the militia. But, as *Emerson* states, the "*'amendment's wording, so opaque to us, made perfect sense to the Framers: believing that a militia (composed of the entire people possessed of their individually owned arms) was necessary for the protection of a free state, they guaranteed the people's right to possess those arms.'*" *Emerson*, 270 F.3d at 235.

7. In assuming the Amendment has no individual right content, *Silveira* ignores the philosophical heritage of the Founders who took from Hobbes, Locke, Montesquieu, Blackstone, etc., the beliefs that: a) the right to arms for defense of self and family is a fundamental human right derived from the sacred right of self-defense; b) that the governed had the right to alter or abolish

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[25] *Cf. Katzenbach, supra* [at p. 323]: *"The word "person" in the context of the Due Process Clause of the Fifth Amendment cannot, by any reasonable mode of interpretation, be expanded to encompass the States of the Union, and to our knowledge this has never been done by any court."* [Another instance of distinguishing between people/persons and the states.]

oppressive forms of government; and c) that sovereignty, with all the implications that term connotes, resides in "the people."

8. With respect to *Silveria's* historical/textual analysis, that opinion fails to address Madison's initial proposal to interlineate the Bill of Rights into the sections of the Constitution in which they were relevant. Madison intended to insert the First, Second, Fourth and other Amendments that guarantee individual rights into Article I, § 9 and Article III, § 2 which contains the original Constitution's few individual rights guarantees (jury trial; ban on ex post facto laws, etc.); but Madison's scheme called for the Tenth Amendment, dealing with state powers, to go into a new and entirely different Article VII. See: *Emerson, supra*, 270 F.3d at 246, fn. 54.

9. The *Hickman* and *Silveira* decisions are also in conflict with the legislative and executive branch interpretations of the "right to keep and bear arms." Congress has declared the Second Amendment to be a right of citizenship.[26] See, e.g., Firearm Owners' Protection Act of 1986, Pub. L. No. 99-308, 100 Stat. 449 (May 19, 1986). Based upon the Solicitor General's brief urging the Supreme Court to deny certiorari in the *Emerson* case, the

[26] See also: Stephen P. Halbrook, "Congress Interprets the Second Amendment: Declarations by A Co-Equal Branch on the Individual Right to Keep and Bear Arms," 62 TENN. L. REV. 597 (1995).

executive branch of our federal government is in accord.[27]

IV. CONCLUSION RE: *EN BANC* REHEARING

It may be inevitable that the Second Amendment Jurisprudence will end up being addressed by the U.S. Supreme Court. If that happens, and the decisions of the Ninth Circuit are to be reviewed by that body, then the legal scholarship that is to carry the prestige of this Court should be vetted by the entire panel so that only a balanced and thorough rendering of the law from this Circuit is subjected to Supreme Court analysis.

Hickman v. Block, supra was a fluke[28] that has worked to the advantage of those who would seek to perpetuate a binary approach to Second Amendment issues. *Silveria v. Lockyer, supra* seeks to perpetuate an error that will prevent any further illumination of this important topic by foreclosing any litigation regarding the Second Amendment. The Second Amendment will then become a vestigial Amendment, not due to any lack of cases and/or controversies, like the Third Amendment[29], but because the Courts have chosen to close their doors on this issue and refuse to aid the executive and legislative branches in

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[27] A request for judicial notice of these official documents was granted by the *Nordyke* panel. The Solicitor General's brief is available at: *http://www.usdoj.gov/osg/*.

[28] Fluke, n. an accidental advantage; stroke of good luck; an accidentally successful stroke as in billiards. *Webster's New Universal Unabridged Dictionary* (1994)

[29] Although see: *Engblom v. Carey*; 677 F.2d 957 (2nd Cir. 1982) for modern decision finding the Third Amendment incorporated as against state action through the 14th Amendment Due Process Clause and an individual right vindicated by this otherwise dormant amendment.

deciphering one of the most important issues facing our nation.

As Judge Gould stated in his concurring opinion in *Nordyke v. King*:

> We would make progress if the Supreme Court were to establish a doctrine of an individual Second Amendment right subject to reasonable government regulation. The decisional chips would thereafter fall where they may on the basis of particular cases and the delicate balance of their precise facts, aided by the Complementary efforts of lawyers, scholars and judges.n10 The law would best put aside extreme positions and adopt an assessment of reasonableness of gun regulation, for this would place us on the right track.n11

-------Begin Concurring Opinion Footnotes-------

[10] The law develops through interdependent actions of academics advancing theories, advocates championing them in litigation, and Judges making decisions that clarify doctrine. The process is ongoing, for after decisions, academics will critique and offer suggested improvements, advocates will bring cases arguing what Judges said as refined by academic feedback, and more refined decisions result from this process. See Hon. Wade H. McCree, Jr., The Annual John Randolph Tucker Lecture, Partners in a Process: The Academy and the Courts, 37 Wash. & Lee. L. Rev. 811, 1041 (1981).

[11] In my view it is an error, though understandable one, to view the Second Amendment exclusively or primarily with the issue in mind of whether it constrains gun control. That controversial issue, as important as it may be, can be a distorting lens through which to view the Amendment if it clouds judgment and prevents understanding of the basic purposes of the Second Amendment. Instead, the Second Amendment should be considered in light of its core purposes of protecting the nation's safety from external threat or internal tyranny. However, recognition of individual right

in the Second Amendment, to protect national security, is not inconsistent with reasonable regulation, which may be permissible under several theories: (1) all weapons are not "arms" within the meaning of the Second Amendment; (2) "arms" protected may be limited to those consistent with use by an organized military force, as suggested in *Miller*; and (3) important government interests may justify reasonable regulation.

---------End Concurring Opinion Footnotes---------

Plaintiff-Appellants respectfully request that the Ninth Circuit – sitting *en banc* – take up the Second Amendment and give it a full hearing before this august body.

V. PETITION FOR PANEL REHEARING

Plaintiff-Appellants respectfully submit that four (4) factual issues were overlooked by the Panel with respect to the First Amendment issues.

1. "The Ordinance would forbid the presence of firearms at gun shows, such as Nordyke's, held at the Fairgrounds. Practically, the Ordinance makes it unlikely that a gun show could profitably be held there." *Nordyke v. King*, 229 F.3d 1266, 1268. (Certification Order)

2. "[T]he effect on the Nordykes of the Ordinance banning guns on county property is to make gun shows on such property virtually impossible." *Nordyke v. King*, 27 Cal. 4th 875, 882. (California Supreme Court Opinion)

3. The statistical analysis of, and declarations by vendors, exhibitors and patrons of guns

shows stating the reasons for attending guns shows. [ER, Vol. I, Tabs 2 & 5]

4. The uncontroverted testimony – via declaration – of the Nordykes stating that it is impossible to hold a gun show without guns present. [ER, Vol. I, Tabs 3 & 4]

Footnote 3 in this Panel's decision noted that its holding does not foreclose a future "as applied" challenge to the Ordinance. *Plaintiff-Appellants* contend that no future challenge is necessary as there is ample evidence that the ordinance *in fact* stops gun shows from occurring and there are two judicial findings that the ordinance has that effect.

The *Nordyke* opinion assumes that a gun show is just an occasion for selling guns; that selling guns is not protected speech; and, while some people may engage in protected speech at gun shows (e.g. exhibiting their gun collections, engaging in Civil War re-enactment) those are merely auxiliary activities which can only be the subject for an "as applied" challenge to the ordinance. On the contrary, the *Plaintiff-Appellant* gun show operators (the Nordykes) are not in the business of selling guns. They are in the business of: a) selling space at the show to exhibitors, many of whom sell nothing, but rather just exhibit guns as part of artistic or other endeavors; and b) by charging admission to attendees who come to look at what is exhibited, many of whom buy nothing.

To say that an ordinance aimed at making gun shows impossible does not on its face infringe on the First Amendment is comparable to saying that Defendants could ban plays without infringing the First Amendment because playhouses generally offer to sell refreshments to

the audience – which sales are not protected by the First Amendment. Recall: The lead Defendant in this case MARY V. KING issued a press release and authored a memorandum[30] admitting that the ordinance was designed to ban gun shows, and both this Court and the California Supreme Court recognize that that is its actual effect.

Plaintiff-Appellants respectfully request either a Panel Rehearing on this limited issue, or further guidance from the Court on what kind of facts it would find persuasive that are not already part of the record.

Dated: April 1, 2003

RESPECTFULLY SUBMITTED,

/s/ Donald Kilmer
Donald E. J. Kilmer, Jr.
Attorney for *Plaintiff-Appellants*

[30] See: ER, Vol II, Tab 16, Sub-Tabs D & E

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RUSSELL ALLEN NORDYKE; ANN SALLIE NORDYKE, dba TS Trade Shows; JESS B. GUY; DUANE DARR; WILLIAM J. JONES; DARYL DAVID; TASIANA WERTYSCHYN; JEAN LEE, TODD BALTES; DENNIS BLAIR; R.A. ADAMS; ROGER BAKER; MIKE FOURNIER; VIRGIL McVICKER,

Plaintiffs-Appellants,

v.

MARY V. KING; GAIL STEELE; WILMA CHAN; KEITH CARSON; SCOTT HAGGERTY, COUNTY OF ALAMEDA; THE COUNTY OF ALAMEDA BOARD OF SUPERVISORS,

Defendants-Appellees.

No. 99-17551

D.C. No. CV 99-04389 MJJ

ORDER

(Filed Sep. 06, 2002)

BEFORE: ALARCÓN, O'SCANNLAIN, and GOULD, Circuit Judges.

Appellants' motion for supplemental briefs is GRANTED. The parties are invited to file simultaneous supplemental briefs addressing the Federal Constitutional issues, including, inter alia, the impact of *Emerson v. United States*, 270 F.3d 203 (5th Cir. 2001), *cert. denied*, 122 S. Ct. 2362 (2002) on the ordinance prohibiting possession of firearms on county property. Briefs shall be filed with the Clerk of Court within twenty-one days of the date of this order and shall not exceed 7000 words.

Appellants' request for judicial notice is DENIED without prejudice to renewal in the course of supplemental briefing.

William and Mary Quarterly, 3d Series, Volume LV, Number 1, January 1998

The Federalized Militia Debate: A Neglected Aspect of Second Amendment Scholarship

Don Higginbotham

THE past fifteen years or so have brought heated debate on one aspect of the Second Amendment. Does its gun ownership language provide both a personal right to keep firearms – for protection and other private purposes such as hunting and recreation – and a collective right to defend society as a member of the militia? Historians such as Robert E. Shalhope, Lawrence Delbert Cress, and Joyce Lee Malcolm have addressed these issues.[1] They have been

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Don Higginbotham is Dowd Professor of History at the University of North Carolina at Chapel Hill. He wishes to thank Kenneth R. Bowling, Lawrence Delbert Cress, Robert Gough, John P. Kaminski, Richard H. Kohn, Harold Hyman, Stuart Leibiger, Paul David Nelson, and David Skaggs for their comments on this article as well as a referee for the *Quarterly*.

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[1] Shalhope, "The Ideological Origins of the Second Amendment." *Journal of American History*, 69 (1982), 599-614; Cress, "An Armed Community: The Origins and Meaning of the Right to Bear Arms, ibid., 71 (1984, 22-42; Shalhope and Cress, "The Second Amendment and the Right to Bear Arms: An Exchange," ibid., 587-931 Malcolm, *To Keep and Bear Arms: The Origins of an Anglo-American Right* (Cambridge, Mass., 1994), Cress, rejecting any Second Amendment guarantee of gun ownership as a basic right: sees the amendment solely as reflective of Americans' belief in the citizen's collective obligation to defend society as a member of the militia. Shalhope and Malcolm view the amendment as recognizing both the individual's personal right and the collective rights to possess arms. Unlike Cress and Shalhope, Malcolm, in her very recent book, pushes the argument back beyond the ratification struggle over the Constitution and the Revolution itself to the English Bill of Rights and subsequent British laws and judicial writings. She

(Continued on following page)

joined in increasing numbers by members of the legal academy. The lawyers have concentrated on the individual rights question, which the great majority of them answer affirmatively.[2]

Virtually absent from these gun ownership and gun rights arguments, in both the legal and the historical literature, is what Americans had to say about control of the state militias before, during, and after the writing of the Constitution. The subject is important because it shows how radical was the shift from the states' total control of their militias to the sharing of that authority under the Constitution, how disturbing this development was to the Antifederalists, how James Madison dealt with Antifederalist concerns in the Second Amendment, and, finally, how the issue was gradually resolved in the first half of the nineteenth century. In all the discussions and debates, from the Revolution to the eve of the Civil War,

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contends that the ownership of guns, apart from any responsibility for the common defense, became a well-recognized right in England long before the American Revolution. In time, according to Malcolm, this attitude about gun rights became conventional wisdom in British America, as did certain other dimensions of English common law. It evolved and became generally understood and accepted, regardless of how often or in what form it received articulation. According to Malcolm, this "English influence on the Second Amendment is the missing ingredient that has hampered efforts to interpret its intent correctly," *In To Keep and Bear Arms*, xii.

[2] Scott Heller, "The Right to Bear Arms: Some Prominent Scholars Are Taking a New Look at the Second Amendment," *Chronicle of Higher Education*, 41 (July 21, 1995), A8, A12. See also "An Open Letter on the Second Amendment," a full-page ad from "Academics for the Second Amendment," ibid. (Aug. 11, 1995). A23. Thirty-one of the 51 signers are members of the legal academy. For a scathing attack on the individual rights view of the Second Amendment see Garry Wills, "To Keep and Bear Arms," *New York Review of Books*, 42 (Sept. 21, 1995), 62-73.

there is precious little evidence that advocates of local control of the militia showed an equal or even a secondary concern for gun ownership as a personal right.

The language of the Constitution provides the base for the militia control controversy in the late 1780s. Article I, Section 8 declares that "The Congress shall have power . . . To provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions." Although the states retain the authority to train the militia and to appoint its officers, Congress has the power "to provide for organizing, arming, and disciplining the militia and for governing such part of them as may be employed in the service of the United States." The Antifederalists gave initial definition and drive to the controversy over the meaning and application of these terms, but none of their proposals for limitations or prohibitions on the federalized militia appears in the Second Amendment, which, writes Leonard W. Levy, is "as vague as it is ambiguous."[3] It therefore became the responsibility of Congress, with some assistance from the Supreme Court, to implement the Constitution's militia clauses.

After showing that colonial and Revolutionary Americans were virtually of one mind in espousing a well-regulated militia under local authority, this article reviews the breakdown of that consensus brought about by the militia's performance in the War of Independence and during Shays's Rebellion. After looking into the militia provisions of the Constitution, it examines the Antifederalists'

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[3] Levy, *Original Intent and the Framers' Constitution* (New York, 1988), 341.

negative reactions to those provisions and their failure to accomplish their agenda in the Second Amendment. It then shows how Congress and the Supreme Court resolved the constitutional questions concerning the federalization of the militia for domestic purposes. That resolution, together with the limited extent to which the national government actually called out the militia in peacetime – the subject of the final part of this article – explains why, for all practical purposes, a long and hotly disputed ideological issue disappeared. That the states were rarely called on to send their militias into national service, however, proved no guarantee that the institution itself was, in the classic phrase, the great palladium of liberty that Antifederalists and other states' rights advocates claimed it to be.

In their newspaper and pamphlet responses to Britain's new imperial policy after the Seven Years' War, the colonists decried, among other ominous developments, the decline of the metropolitan militia and the increasing use of redcoats to preserve law and order in both the parent kingdom and its transatlantic dominions.[4] Americans asserted that if their civil officials encountered domestic commotions, they should appeal only to their local militias for support, a contention that reflected both their reading of the dangers of standing armies in English history and

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[4] T.A. Critchley, *The Conquest of Violence: Order and Liberty in Britain* (London, 1970); Tony Hayter, *The Army and the Crowd in Mid-Georgian England* (London, 1978); Pauline Maier, *From Resistance to Revolution: Colonial Radicals and the Development of American Opposition to Britain*, 1765-1776 (New York, 1972); Hiller B. Zobel, *The Boston Massacre* (New York, 1970); John Shy, *Toward Lexington: The Role of the British Army in the Coming of the American Revolution* (Princeton, 1965).

their own colonial experience. It became a tenet of faith that colonial authorities should retain jurisdiction over their provinces' militias and other forces. That view brought displeasure to royal governors during the imperial wars, for the provincial assemblies claimed and exercised such power over the militia to set salaries, to authorize the stores and equipment to be raised, to determine the number of men called for service, to prescribe organization and training, and to forbid or limit duty outside their provinces. Consequently, American lawmakers hamstrung royal administrators and British officers who sought to establish control over colonial fighting men.[5] The colonists predictably reacted vigorously when royal governors in 1775 attempted to seize militia arsenals at Williamsburg and Concord, the latter episode igniting the War of Independence.

The pattern of home control of local military organizations continued in the Revolution. Both conviction and precedent explain why the language of the thirteenth article of the Virginia Declaration of Rights in 1776 resounded through similar state charters. The Virginia document declared "that a well-regulated militia, composed of the body of the people trained to arms, is the

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[5] The substantial literature on friction concerning control of provincial forces in wartime includes Jack P. Greene, *The Quest for Power: The Lower Houses of Assembly in the Southern Royal Colonies, 1689-1776* (Chapel Hill, 1963), 297-309; Don Higginbotham, *The War of American Independence: Military Attitudes, Policies, and Practice, 1763-1789* (New York, 1971), chap. I; Alan Rogers, *Empire and Liberty: American Resistance to British Authority, 1755-1769* (Berkeley, 1974); Fred Anderson, *A People's Army: Massachusetts Soldiers and Society in the Seven Years' War* (Chapel Hill, 1984); and Douglas Edward Leach, *Roots of Conflict: British Armed Forces and Colonial Americans, 1677-1763* (Chapel Hill, 1986).

proper, natural and safe defence of a free state . . . and that in all cases, the military should be under strict subordination to, and governed by, the civil power." The new state constitutions gave the legislatures the power to mobilize the militia, and mustering them for campaigns usually required the approval of the state executive council, which the legislatures themselves elected in most states. For Congress or the army to attempt to take over the militias or to send them against their will outside their own states would constitute "a Subvertion of all Liberty," asserted Abraham Clark of New Jersey, who lectured the speaker of his state's assembly on the need to "Oppose Tyranny in all its Strides."[6] Noting that few if any structures symbolized state sovereignty more than the militia, Cress calls the institution "central to the political stability and constitutional balance that sustained a republican constitution."[7]

George Washington, critical of a system that at best provided poorly trained men for limited service in his Continental army, addressed the sensitive issue of militia control near the war's end in 1783. His "Sentiments on a Peace Establishment" a document that anticipates crucial elements of military policy debate for the next two centuries, proposed that America retain its Revolutionary practice of regular and state forces but with fundamental alterations in the militia system. Congress should create

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[6] "Virginia Bill of Rights," in S.E. Morison, *Sources and Documents Illustrating the American Revolution*, 2d ed, (Oxford, 1929), 151; Ruth Bogin, *Abraham Clark and the Quest for Equality in the Revolutionary Era, 1774-1794* (Rutherford, N.J., 1982), 22, 25.

[7] Cress, *Citizens in Arms: The Army and the Militia in American Society to the War of 1812* (Chapel Hill, 1982), 73.

two classes of militia within each state, each more effectively organized than the present militias. The first and larger class would, as in the past, include all men from ages sixteen to fifty. It would represent an improvement over the old system in that its establishment, exercise, and weapons would be uniform in all the states. Even so, the class could hardly be trusted to meet the nation's most critical needs. For "amongst such a Multitude of People . . . there must be a great number, who from domestic Circumstances, bodily defects, natural awkwardness or disinclination, can never acquire the habits of Soldiers." The second class, drawn from the first, would be composed solely of young, able-bodied volunteers or draftees. While on active duty, this class would be under direct federal jurisdiction. Its primary task would be to resist "any sudden impression which might be attempted by a foreign Enemy," affording time for Congress to begin full-scale mobilization.[8]

Militia reform, like other schemes for empowering Congress under the Articles of Confederation, found a chilly reception. Washington's "Sentiments," though approved in revised form by a Congressional committee, elicited scant support in the full legislative body. In 1786, Henry Knox, secretary at war for the Confederation, advanced a militia plan that resembled Washington's blueprint in some respects and also responded to parochialists' fears that a nationalized

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[8] Washington, "Sentiments on a Peace Establishment," in John C. Fitzpatrick, ed., *The Writings of George Washington from the Original Manuscript Sources, 1745-1799*, 39 vols. (Washington, D.C., 1931-1944), 26:374-98, quotations on 389, 389-90. An overall assessment of the Revolutionary militias' performance appears in Higginbotham, *War and Society in Revolutionary America: The Wider Dimensions of Conflict* (Columbia, S.C., 1988), 106-31.

militia might be corrupted and cease to embody republican virtue. Knox proposed that militiamen in federal training would hear lectures on the glories of republican institutions and would engage only in recreation and amusements that were morally and physically uplifting. Moreover, militia units called outside their states to deal with threats and emergencies would be returned in no more than a year, a provision Knox believed would dampen apprehensions of misusing the militia or turning the state troops into a standing army. Even so, Knox's recommendations suffered the fate of Washington's "Sentiments."[9]

The Articles referred to every state's maintaining "a well regulated and disciplined militia," yet they contained no authorization for the central government under any circumstance to assemble for training or any other reason even some small part of the state militias. Only the broadest interpretation of Congressional authority could read into the Articles a power to dictate militia regulations or responsibilities to the states. Short of amendments – and they required unanimous approval from the thirteen states – Congress could not reform the militias, even had it a mind to do so.[10]

Although the Confederation's main line of defense in the post-1783 years consisted of a single regiment under the control of Congress, the states proved unwilling to upgrade the militias on their own initiative. David Ramsay, a

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[9] Knox, *A Plan for the General Arrangement of the Militia of the United States* (Philadelphia, 1786). The best treatment of militia reform efforts, including congressional attitudes on the subject, is Cress, *Citizens in Arms*, chap. 5.

[10] Articles of Confederation, Article VI.

former South Carolina congressman, complained that "our governments are too relaxed to bear any [militia] system . . . attended with . . . time & expense,"[11] Part of the problem stemmed from opposition of local elites. In Virginia, for example, the legislature, responding to Washington's recommendation that the states replace their militia officers with former officers of the Continental army "so far as can be done without creating uneasiness and jealousy," authorized Governor Patrick Henry to make wholesale replacements.[12] Henry made a number of appointments but ran into strong resistance, for loss of office also meant diminution of the senior officers' local standing and influence. As one appointee who declined to accept his commission explained, he did not hail from one of the foremost Augusta County families and did not wish to be "an object of . . . utmost resentment." The following year, the legislature, beating a retreat, returned the displaced militia officers to their commands.[13]

The nationalists, persistent advocates of a more consolidated political union, saw the uneven performance of the Massachusetts militia in Shays's Rebellion as a

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[11] Ramsay to Knox, Mar. 12, 1786, in Robert L. Brunhouse, ed., *David Ramsay, 1749-1815: Selections from His Writings*, American Philosophical Society, *Transactions*, New Ser., 55, pt. 4 (Philadelphia, 1965), 98-99.

[12] Washington, "Sentiments on a Peace Establishment," 394.

[13] Robert Porterfield, quoted in Harrison E. Ethridge, "Governor Patrick Henry and the Reorganization of the Virginia Militia, 1784-1786," *Virginia Magazine of History and Biography*, 85 (1977), 436. Madison, in describing the opposition to the new law as limited to a minority of counties, may have underestimated the number of critics; Madison to Thomas Jefferson, Jan. 22, 1786, in William T. Hutchinson et al., eds., *The Papers of James Madison*, Congressional Series, 17 vols. (Chicago and Charlottesville, 1962-1991), 8:478.

further indication of the need for improving militia by the central government. In 1786, several thousand men took up arms, closed the courts in western counties, and threatened the Confederation's arsenal at Springfield. Some militia units in the insurgent counties supported the rebels. A battle between state troops and dissidents at Springfield produced defections to the rebel ranks. In time, the government forces prevailed, but not before the Confederation was gravely shaken.[14] Other states likewise suffered from postwar economic dislocation; would they be spared similar tumults? A less publicized confrontation had occurred almost simultaneously in New Hampshire. There, angry debtors led by militia officers surrounded the building in Exeter where the legislature was in session and announced that none could leave until the besiegers obtained an acceptable response to their petitions for relief. The following day, militia from the state's eastern towns dispersed the insurgents.[15] Everywhere, newspaper

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[14] Robert J. Taylor, *Western Massachusetts in the Revolution* (Providence, R.I. 1954), chap. 7; David P. Szatmary, *Shays' Rebellion: The Making of an Agrarian Insurrection* (Amherst, Mass., 1980), chaps. 6-7; Cress, *Citizens in Arms, 95-97*. For recent interpretations of Shays's Rebellion see Richard D. Brown, "Shays's Rebellion and the Ratification of the Federal Constitution in Massachusetts," in Richard Beeman, Stephen Botein, and Edward C. Carter II. eds., *Beyond Confederation: Origins of the Constitution and American National Identity* (Chapel Hill, 1987), 113-27, and Robert A. Gross, ed., *In Debt to Shays: The Bicentennial of an Agrarian Rebellion* (Charlottesville, 1993).

[15] Jeremy Belknap, *History of New Hampshire. . . .* 3 vols, (Boston, 1813), 2:360-64; Alan Taylor, "Regulators and White Indians: The Agrarian Resistance in Post-Revolutionary New England," in Gross, ed., *In Debt to Shays*, 145-50, Debtor violence on a lesser scale also took place in the backcountry from New Jersey to South Carolina. See Richard B. Morris, *The Forging of the Union, 1781-1789* (New York, 1987), 264-65.

essays and letters echoed Washington's exclamation that "combustibles in every State" menaced the tranquility of the states and the stability of the union itself.[16]

The authors of the federal Constitution saw a critical need to impose controls over the internal affairs of the states in general and over the state militias specifically, to counter domestic turmoils. They added a new component to the idea of a federalized militia as detailed by Washington, Knox, and several other generals of the Continental army. It now appeared insufficient to provide better training and a measure of Congressional oversight. Consequently, the Philadelphia Constitutional Convention gave Congress authority to employ the militia against the states or any of their citizens in certain cases involving internal disturbances and breaches of federal law.

Owing to a preoccupation with such major concerns as the structure of the central government and representation issues, the subject of militia control was not formally addressed by the full convention until August 6, when the committee of detail reported the first draft of a constitution. Surprisingly, in light of earlier negative views on militia reform and the presence in the convention of men who held such views, the delegates agreed with little debate to accept the committee's all-embracing language empowering the national legislature "to call forth the aid of the militia" not only to "repel invasions" but also "to execute the laws of the Union" and to "suppress insurrections." Some of

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[16] John K. Alexander, *The Selling of the Constitutional Convention: A History of News Coverage* (Madison, Wis., 1990), 20-21, 34, 54-55, 99-101, 142-43, 169-70 n. 65; Washington to Knox, Dec. 26, 1786, in W.W. Abbot et al., eds., *Papers of George Washington*, Confederation Series, 6 vols. (Charlottesville, Va., 1992-1997), 4:482.

the more state-minded delegates, however, favored a limit on the portion of any state's militia that might be subject to federally imposed rules for training and that might be called up for national service at one time. But these were mainly differences of degree; the idea of some measure of federal oversight and control in these two areas was questioned on the floor by only two delegates: Elbridge Gerry of Massachusetts and Luther Martin of Maryland. The task of dealing with the delegates' differences over this part of the militia wording fell on August 18 to a committee of eleven. Three days later, the committee reported militia language almost identical to that in the final document: Congress was "to make laws for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively, the appointment of the Officers, and the authority of training the militia according to the discipline prescribed by the United States." The convention then agreed to accept the committee report in two votes: 9-2 and 7-4, the four negatives in the second vote coming from states that wished to reduce the federal role in training the militia.[17]

The militia provisions of the Constitution flew in the face of so much American thinking and experience and so became subject to Antifederalist attack. On December 12, 1787, at the Pennsylvania ratifying convention, the first to be held, Robert Whitehill introduced one of the most detailed Antifederalist resolutions on the militia to appear during the ratification contest. It stated "that the power of

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[17] Max Farrand, ed., *Records of the Federal Convention of 1787*, rev. ed., 4 vols. (New Haven, 1937), 2:182, 323, 326, 330-33, 352, 355-56, 380-81, 382, 384-88, 390.

organizing, arming, and disciplining the militia (the manner of disciplining the militia to be prescribed by Congress) remain with the individual states, and that Congress shall not have authority to call or march any of the militia out of their own state, without the consent of such state and for such length of time only as such state shall agree."[18] Whitehill's resolutions set the stage for the militia debate that would be repeated in subsequent conventions and the press.

The absence of stated limits to Congressional control, asserted the Antifederalists, would generate repeated military interventions in the domains of the states and the lives of the people, especially because, as Patrick Henry warned, the Constitution did not define the meaning of executing the laws or suppressing insurrections.[19] Critics of the Constitution feared that only military coercion could hold together a consolidated republic in a sprawling country like the United States, with its diverse regions and heterogeneous population, but such use of force, declared the "Federal Farmer," would "very soon destroy all elective governments in the country, produce anarchy, or establish despotism."[20] Antifederalists warned that the people's resistance to unjust and discriminatory taxation would prompt the federal government to resort to arms. "Is it not well known," asked Virginia's George Mason,

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[18] Whitehill, resolution 11, in Merrill Jensen, John P. Kaminski, Gaspare J. Saladino, et al., eds., *The Documentary History of the Ratification of the Constitution*, 12 vols. to date (Madison, Wis., 1976-), 2:598, hereafter cited as *Documentary History Ratification*; For similar views expressed by Pennsylvania Antifederalist delegate John Smilie see ibid., 508-09.

[19] Henry's speeches, ibid., 10:1277, 1300.

[20] "Federal Farmer," ibid., 14:29.

"that what would be a proper tax in one State would be grievous in another?"[21]

An oft-repeated Antifederalist scenario explained how the sword would be employed. The national government would quite possibly be too shrewd to send a standing army to enforce the laws and intimidate the people, a step that would raise specters of Caesar, Cromwell, and George III. Rather, it would resort to the federalized militia; it would confuse the people by using the body of the people against the people. Mason had endeavored to address this fear at the Constitutional Convention. He wanted to preface the section on federalizing the militia by stating that to do so would have made it transparent that the purpose of the militia in national service was to protect freedom, not to threaten it. But Gouverneur Morris of Pennsylvania – supported by Charles Pinckney of South Carolina and Gunning Bedford of Delaware – called the Mason addition a slap in the face of American professional soldiers, "the military class of Citizens," and it met defeat.[22]

As Antifederalists saw it, the militia under federal control would possess all the evils associated with a standing army. Congress's power to impose harsh discipline would brutalize the militia into submission by fines,

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[21] George Mason's speech, ibid., 9:937; "Centinel 1" and "Dissent of the Minority of the Convention," ibid., 2:162, 635-39 passim; Henry's speech, ibid., 10:1300; Jackson Turner Main, *The Antifederalism Critics of the Constitution, 1781-1788* (Chapel Hill, 1961), 143-45.

[22] Mason's proposed preface to the militia language in Article I, Section 8 of the Constitution declared: "And that the liberties of the people may be better-secured against the danger of standing armies in time of peace"; Farrand, ed., *Records of the Federal Convention of 1787*. 2:616-17.

corporal punishment, and fear of death by court-martial. Having been thus transmogrified into myrmidons, citizen-soldiers would become the mirror image of European professionals. These "meer machines as Prussian soldiers" would lose their devotion to freedom and to the dignity of the individual as they became walled off from the body politic. Of course, some yeomanry might be too sensitive and independent-minded to be deceived or to knuckle under. It would be terribly distasteful, for instance, for Pennsylvania militiamen, many of them doubtless Quakers opposed to military obligations in principle and anti-slavery in sentiment, to be sent to Georgia to suppress slaves revolting for "*sacred liberty.*" To avert such defection or disobedience, the national administration would concentrate its energies on militiamen from "the young and ardent part of the community, possessed of but little or no property."[23]

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[23] Quotations from "Centinel III," "Philadelphiensis II," and "Federal Farmer," in Jensen et al., eds., *Documentary History Ratification*, 14:60, 253-54, 37-39; "Aristocrotis," "The Government of Nature Delineated," in Herbert J. Storing, ed., *The Complete Anti-Federalist*, 7 vols. (Chicago, 1981), 3:16.9; Jonathan Elliot, comp., *The Debates in the Several State Conventions on the Adoption of the Federal Constitution, as Recommended by the General Convention at Philadelphia in 1787*, 5 vols., 2d ed. (Philadelphia, 1861-1863), 2:552; Mason's speech, in Jensen et al., eds., *Documentary History Ratification*, 10:1269-70, 1271-72. A broadside published in Maryland, signed J.T. Chase and J.F. Mercer, endeavored to generate public opposition to the Constitution without a bill of rights, which should include "no whipping militia, nor marching them out of the state, without consent of the general assembly"; *Documentary History of the Constitution of the United States of America*, 5 vols. (Washington, D.C. 1894-1905). 4:641-42. Daniel Carroll informed Madison that the broadside had "alarm'd" many people with its "positive assertions"; May 28, 1788, in Hutchinson et al., eds., *Madison Papers*, 22:63.

Although the means might vary, the result would be the same: the militia would become, in effect, a standing army maintained by the states but controlled by the central government.[24] Militias might be dispatched from one end of America to the other to quell insurrections sparked by the most terrible oppressions, leaving their home states defenseless, particularly from Indians on the frontier. This military arm, the erstwhile palladium of liberty, would become an instrument of tyranny. As one Maryland "Farmer and Planter" put it, if you "think you are imposed upon by Congress[,] . . . your great Lords and Masters, and refuse or delay to pay your taxes, or do any thing that they shall think proper to order you to do, they can . . . send the militia of Pennsylvania, Boston, or any other state or place, to cut your throats, ravage and destroy your plantations, drive away your cattle and horses, abuse your wives, kill your infants, and ravish your daughters, and live in free quarters, until you get into a good humour, and pay all that they may think proper to ask of you, and you become good and faithful servants and slaves."[25] In sum, moaned John Smilie in the Pennsylvania convention, the militia, "the last resource of

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[24] Connecticut Antifederalists voiced some of the earliest fears that the federalized militia would become a standing army; Jensen et al., eds., *Documentary History Ratification*, 3:378, 427, 428-29.

[25] "Essay by A Farmer and Planter," in Storing, ed., *Complete Anti-Federalist*, 5:2,3. For examples of other predictions of federalized militia outrages see Jensen et al., eds., *Documentary History Ratification*, 2:509, 13:540. I find no evidence of Antifederalists quoting an intellectual ally, Sir William Blackstone, who wrote that English militiamen "are not compellable to march out of their counties, unless in case of invasion or actual rebellion, nor in any case compellable to march out of the kingdom," in *Commentaries on the Laws of England*, 4 vols. (Oxford, 1765-1769), 2:399.

a free people[,] is taken away" and put in the hands of Congress. "It ought to be considered as the last *coup de grace* to the *State governments*," lamented Luther Martin.[26]

Antifederalists objected in general to the Constitution's bestowal of concurrent powers on the federal government and the states, and nowhere did this shared authority appear more starkly than in the militia provisions. Antifederalists maintained that either the central government or the states would ultimately control the militia. This concern found vociferous expression in the Virginia convention. The new government would be consolidated in character, complained Henry, pointing to the militia language; Congress did not have to receive the approval of the states to call out the militia. The concept of shared jurisdiction was a myth: "To admit this mutual concurrence of powers will carry you into endless absurdity: – That Congress has nothing exclusive on the one hand, not the States on the other!" All such absurdities would resolve to the advantage of the central power. If, for example, a state needed its militia at the same time as the federal government, "Which call is to be obeyed, the Congressional call, or the call of the State Legislature? The call of Congress must be obeyed."[27]

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[26] Smilie's speech in the Pennsylvania convention and Martin, "Genuine Information VII," in Jensen et al., eds., *Documentary History Ratification*, 2:508-09, 15:411.

[27] For examples of attacks on the concurrent powers idea see Henry's speeches, ibid., 9:957-58, 10:1276 (quotation), 2309-11, 1429; Mason's speech, ibid., 9:936-37; William Grayson's speech, ibid., 10:1306.

Antifederalists sought means for redress – for tilting the balance toward the states' retaining greater control of their armed forces – by changing either the text of the Constitution or by adding a national bill of rights. At the Pennsylvania convention, they tried – and failed – to delay approval of the Constitution until adoption of amendments that would have included stipulations for lessening federal authority over the militias. Beginning with the Massachusetts convention, Federalists faced stiffer opposition and increasingly agreed to propose recommendatory amendments in a variety of areas. Massachusetts and four other states offered such recommendations.[28] When the First Federal Congress took up the issue of constitutional change in 1789, it had approximately one hundred separate proposals on a broad range of topics available for consideration.[29]

Because Madison, who introduced amendments in the House of Representatives after pledging to do so at the Virginia convention, supported almost exclusively stipulations guaranteeing individuals and collective rights, he

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[28] For a state-by-state analysis of the tactics and strategies of the Federalists and Antifederalists in the ratifying conventions see Michael Allen Gillespie and Michael Lienesch, eds., *Ratifying the Constitution* (Lawrence, Kan., 1989).

[29] Helen E. Veit, Kenneth R. Bowling, and Charlene Bangs Bickford, eds., *Creating the Bill of Rights: The Documentary Record from the First Federal Congress* (Baltimore, 1991), xi, 14-28; Edward Dumbauld, *The Bill of Rights and What It Means Today* (Norman, Okla., 1957), 173-205. The number can be placed as high as 210 if one counts duplicate proposals, many of which did not relate to rights but instead focused on structural changes in the central government. In fact, structural "alterations formed a clear majority of both the 210 and the 200"; Bowling, "'A Tub to the Whale': The Founding Fathers and Adoption of the Federal Bill of Rights," *Journal of the Early Republic*, 8 (1988), 228.

avoided all recommendatory amendments that would have created structural changes in the Constitution, including weakening the power of Congress over the militia.[30] Recommendations for limiting the militia's numbers in federal employment, restricting its time under national control, regulating its out-of-state service, subjecting its rank and file to martial law, and providing for its training all failed to find their way into what became the Second Amendment. One measure advocated by some Antifederalists, freeing conscientious objectors from military participation, passed in the House but lost in the Senate. Still another proposal popular with some Antifederalists – that the militia would remain under state control except when in the employment of the United States – was introduced in the House but received little support, perhaps because it failed to go beyond the language already in the Constitution. In any case, Congress, composed largely of Federalists, showed no inclination whatsoever to mollify Antifederalists on the subject of the militia.[31] The members, with few exceptions, shared Madison's belief that a bill of rights should be a statement of general principles rather than a document that included particulars and policies that, in their view, were more properly determined by statute law.

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[30] Stuart Leibiger, "James Madison and Amendments to the Constitution, 1787-1789: 'Parchment Barriers,'" *Journal of Southern History*, 59 (1993), 441-68.

[31] Veit, Bowling, and Bickford, eds., *Creating the Bill of Rights*, 12, 30, 38-39n, 182-85, 267, Charles A. Lofgren argues that the conscientious objector issue came up mainly in discussions of the militia rather than in regard to federal armies and navies because both Federalists and Antifederalists considered the Constitution as limiting the citizen's military obligation to compulsory service in the militia, in "Compulsory Military Service under the Constitution: The Original Understanding," *William and Mary Quarterly*, 3d Ser., 33 (1976), 61-88.

The Federalists, in refusing proposals for change, responded as they had done during ratification. They dismissed Antifederalist apprehensions as totally unrealistic. In The Federalist, Hamilton branded them as "far fetched and ... extravagant," and Madison dismissed them as "misguided exaggerations."[32] Denying that Congress would enact legislation that would be harsh or discriminatory toward states or large numbers of people, Federalists further contended that civilian officials, including judges, would almost always have the means to uphold federal law and maintain the peace without resorting to the nationalized militia or the army. William Samuel Johnson of Connecticut argued that the Constitution goes to great lengths to avoid military responses to internal difficulties: rather than "armed force.... the power which is to enforce these laws is to be a legal power vested in proper magistrates."[33] Consequently, as Virginia Federalists repeatedly pointed out, militias, with very rare exceptions, would remain under direct control of the states, which would be free to increase their arms and their training as they saw fit. Edmund Randolph reminded Virginia's convention that militia officers, appointed by and

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[32] Nos. 29, 46, in Jacob E. Cooke, ed., *The Federalist* (Middletown, Conn., 1961), 185, 321.

[33] Jensen et al., eds., *Documentary History Ratification*, 3:546. For the same point see Hamilton, No. 27, in Cooke, ed., *Federalist*, 171-75. In Federalist No. 28, ibid., 176-8a, Hamilton conceded that there might be rare exceptions when force would be needed. Although he was unclear whether the federalized militia or regular troops would be employed in such circumstances, he stated that the decision would be made by the representatives of the people. He went on to say, in Federalist No. 29, ibid., 181-87, that the well-trained, properly disciplined federalized militia is preferable because standing armies are more likely threats to liberty.

subject to removal by the states, would hardly give up their state loyalties if and when they entered federal service. Randolph, reflecting other supporters' sentiments, ridiculed the opposition's lack of "common sense" in "interpreting this Constitution."[34]

The rhetoric of Antifederalists and Federalists will never enable us to understand fully what the members of the First Congress intended by the language of the Second Amendment: "A well-regulated militia, being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed." The problem is that, with exceedingly few exceptions, we do not know how individuals in either camp understood the amendment as it moved through the Congress to the state legislatures. Neither side displayed unanimity of views about the strengths and weaknesses of the Constitution. Much has been said over the years about the difficulty of determining the original intent of the authors of the Constitution; the same holds true of those who voted – warmly or halfheartedly – for rights amendments or for the Bill of Rights itself, a subject that gained the serious attention of Congress only as a result of Madison's prodding in 1789.[35]

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[34] Jensen et al., eds., *Documentary History Ratification*, 9:1014, 1074, 1102, 10:1288 (quotation), 1289, 1293-94, 1295, 1311-12, 1324-25, 1486, 1531. Hamilton and Madison also stressed officers' loyalty to the states that appointed them as a safeguard against federal misuse of the militia, in Federalist Nos. 29, 46, in Cooke, ed., *Federalist*; 185, 321-22.

[35] Because the Senate did not initially hold open sessions, little is known about the details of its members' response to Madison's amendments. John Randolph, in New York City at the time the future Second Amendment reached the Senate, informed his stepfather, St. George Tucker, that "a Majority of the Senate were for not allowing the militia arms & if two thirds had agreed it would have been an amendment to the Constitution. They [the senators] are afraid that the Citizens will

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We can only speculate about Madison's motives in introducing the Second Amendment. He may well have done so partly for psychological or symbolic reasons and partly to satisfy – in some measure, at least – the Virginia convention, which wanted not only alterations in the body of the Constitution that would have weakened jurisdiction over the militia but also a bill of rights containing militia language fairly close to Madison's own Second Amendment wording. By conceding something heavy in emotional content but then in substance, something that could be interpreted as each reader chose to do, Madison and his supporters in Congress probably hoped to calm Antifederalist fears. Without dealing with specifics, the amendment seems to imply that the concurrent power of the state and federal governments over the militia will not threaten the states or obstruct their use of the militia when not in federal service. That would include the states' arming and equipping their respective militias if Congress failed to do so. It can surely be seen as a confirmation of their views by that small number of Antifederalists who are known publicly to have favored citizens' right to keep arms for private purposes as well as for collectively defending society as members of the militia.[36] If most Antifederalist

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stop their full Career to Tyranny & Oppression." The House held open sessions, which enabled several men from the press to record its debates, though none did so in a full and systematic way. Much of what later appeared in print on the Bill of Rights debates in the House is technical and procedural rather than substantive. See Veir, Bowling, and Bickford, eds., *Creating the Bill of Rights*, 55-223 passim, quotation on 293.

[36] Ibid, 19, 20. Although Jefferson, from Paris, plied Madison with suggestions for changes in the Constitution, particularly for adopting a national bill of rights, he failed to express any reservations about the militia clauses of the document. See especially Jefferson to Madison,

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writers feared that the central authority would make the militias so muscular that they might serve as a standing army, others saw another disturbing possibility; that the national government would keep the militias too weak to resist the power of a future standing army.[37]

It is clear, in any case, that Congress was less than enthusiastic about a bill of rights and that some Antifederalists were disappointed with the Bill of Rights, including Virginians Richard Henry Lee and William Grayson, the former judging the amendments "much mutilated and enfeebled," the latter calling them "good for nothing."[38]

Dec. 20, 1787, July 31, 1788, Aug. 28, 1789, in Hutchinson et al., eds., *Madison Papers*, 10:336, 11:212-13, 12:364.

[37] "Essays of John DeWitt," in Storing, ed., *Complete Anti-Federalist*, 4:3.27-28; Martin's speech, in Jensen et al., eds., *Documentary History Ratification*, 14:290-91; Henry's speech, ibid., 91957-58; Mason's speech, ibid., 10:1270, 1271; Grayson's speech, ibid., 1306; Henry's speech, ibid., 1535. A Federalist writer correctly noted that the Antifederalists tried to have it both ways: they spoke of the dangers of the federal government's both arming and its failing to arm the state militias; "*The Landowner* No. X," ibid., 16:267.

[38] Richard Henry Lee to [Francis Lightfood Lee], Sept. 13, 1789, in James Curtis Ballagh, ed., *The Lessers of Richard Henry Lee*, 2 vols. (New York, 1911-1914), 2:500; Grayson to Henry, Sept. 29, 1789, in William Wirt Henry, ed., *Patrick Henry: Life, Correspondence, and Speeches*, 3 vols. (New York, 1891), 3:406. There is a disappointing lack of information about the public's reaction to Congress's proposed amendments that became the Bill of Rights, probably because there seems to have been strong public support for most of them. The subject is not even mentioned in Donald H. Stewart. *The Opposition Press of the Federalists Period* (Albany, N.Y., 1969), x, based on "nearly all" of the approximately 550 newspapers published between 1789 and 1801. The existing sources are mainly skeletal outlines of legislative measures. The ratification literature is listed and evaluated by Saladino, "The Bill of Rights: A Bibliographic Essay," in Patrick T. Conley and John P. Kaminski, eds., *The Bill of Rights and the States: The Colonial and Revolutionary Origins of American Liberties* (Madison), Wis., 1992), 484-85. The continued strength of Antifederalism in post-1788 Virginia

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Also opposed was Gerry of Massachusetts, like the two Virginians an Antifederalist member of the First Congress. Gerry singled out the militia amendment as his most serious objection to the Bill of Rights. He saw in it the continuation of a dangerous precedent that had begun with the militia provisions of the Constitution: the sacrificing of the states' total control of the militia to a central government that also had the authority to create a standing army. It reminded him of Britain's efforts during the earlier imperial crisis to keep the Massachusetts militia weak at the same time that royal troops were sent to coerce the Bay Colony.[39]

The new national charter remained in 1789 a skeleton to be fleshed out by laws and judicial interpretation.

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is discussed in Richard Beeman, *The Old Dominion and New Nation, 1788-1801* (Lexington, Ky., 1972), 61-66, and J. Gordon Hylton, "Virginia and the Ratification of the Bill of Rights, 1789-1791," *University of Richmond Law Review*, 25 (1991), 433-74 passim. These accounts suggest that Virginia Antifederalists were less interested in the Congressionally proposed individual rights amendments than in the absence of amendments that would have specifically restricted the powers of the federal government in its dealings with the states. Richard Henry Lee and William Grayson to the Speaker of the Virginia House of Representatives, Sept. 28, 1789, cited in Beeman, *Old Dominion*, 61. In contrast, Georgia, whose convention unanimously ratified the Constitution appears to have taken the view, as reflected in the action of its legislature in rejecting the Bill of Rights, that amendments were premature until the people had a chance to observe the actual workings of the new government after the Constitution went into effect; Julia M. Bland, comp., *Georgia and the Federal Constitution: Proceedings of the State Constitutional Convention, and Proceedings of the State Legislature with Respect to the Amendments Proposed by the United States Congress on September 25, 1789* (Washington, D.C., 1937), 9-15.

[39] George Athan Billias, *Elbridge Gerry; Founding Father and Republican Statesman* (New York, 1976), 232-35; Veit, Bowling, and Bickford, eds., *Creating the Bill of Rights*, 182-84.

President Washington's administration encountered difficulty in getting Congress to implement the Constitution's provisions for bringing the state militias under federal jurisdiction for training. The reasons are complex and not always ideological. The large Federalist majority in the First Congress had refused to weaken Congress's control of the militia in the Second Amendment but was not of one mind about creating a centralized militia establishment.

Congressional divisions on that subject became apparent immediately after Secretary of War Knox, borrowing liberally from militia plans that he and Washington had advanced in the Confederation years, presented an implementation package to the national lawmakers in January 1790.[40] Stressing the need for quick legislative action because of Indian uprisings on the frontier, Knox once again called for a system of classing the militia by age and providing summer encampments and standardized weapons and equipment for the younger militiamen, who would constitute the elite class. Knox, like Washington and other former generals of the Continental army, knew that not all militiamen were well armed and familiar with their weapons.[41] Equally bold, and certainly unprecedented, was

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[40] Knox, "A Plan for the General Arrangements of the Militia of the United States," in Bickford, Bowling, Linda Grant DePauw, and Veit, eds., *Documentary History of the First Federal Congress*, 14 vols. to date (Baltimore, 1972-), 5:1435-57, hereafter cited as *Documentary History First Congress.*

[41] In 1794, Secretary of War Knox stated that of 450,000 men in the militias, probably 100,000 at most owned guns or had been supplied them by their states; *American State Papers: Documents, Legislative and Executive of the Congress of the United States*, class V, *Military Affairs.* 7 vols. (Washington, D.C., 1832-1861), 1:70. Several scholars are currently looking into the subjects of gun ownership and regulation in early America. None has yet produced a major study, but Michael A.

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Knox's recommendation that young men should be denied the full benefits of citizenship until they completed their terms of service in the elite class.

Knox's proposals produced heated opposition in and out of Congress. Critics asserted that classing and summer camps for younger men would be unworkable and exceedingly expensive. The cost, estimated at over $400,000 a year for the "advanced corps," prompted Benjamin Goodhue of Massachusetts, a Federalist member of the House of Representatives, to exclaim, "I believe Knox to be" nearly "the most extravagant man . . . living." Others called for exemptions for numerous occupations and for conscientious objectors, and they denounced Knox for stipulating that citizenship rights should be linked to compulsory military service.[42] According to a satirical piece in Benjamin Bache's Philadelphia *General Advertiser*, one Charlotte informed her friends Sophia and Thalestris that, because Quakers, tradesmen, students, and farmers sought exemptions from militia duty, "I suppose that we young women must learn militia duty, and turn out with

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Bellesiles has written two preliminary offerings. See "Gun Laws in Early America: The Regulation of Firearms Ownership, 1607-1794," paper delivered at the Second Annual Institute of Early American History and Culture Conference, Boulder, Colorado. June 1, 1996, and "The Origins of Gun Culture in the United States, 1760-1865," JAH, 83 (1996), 425-55.

[42] As early as April 26, 1790, about 7 months before Congress formally debated the measure, Senator William Maclay of Pennsylvania predicted that it had no chance of adoption; Bowling and Veit, eds., *The Diary of William Maclay and Other Notes on Senate Debates, March 4, 1789-March 3, 1791* (Baltimore, 1988), 246-47. An excellent summary of the early reaction to Knox's plan is in Richard H. Kohn, *Eagle and Sword: The Federalists and the Creation of the Military Establishment in America, 1783-1802* (New York, 1975), 128-33, Goodhue quotation on 131.

both musquet and bayonet." Two authorities state that "nothing [the First Federal Congress] considered raised as much organized public opposition as Knox's militia plan."[43]

Congress backed off, taking the customary route of legislative bodies that seek to escape the heat: a committee drafted a bill, encouraged further public commentary, and put the controversial measure aside for months while lawmakers dealt with other divisive issues such as Hamilton's financial program and the location of the national capital.[44] The Knox legislation eventually limped through a succession of ad hoc committees in 1790 and 1791, each one further weakening its original contents. The first and only full debate on the much-revised militia bill terminated with the end of the First Congress in early 1791. The national legislators, hopelessly divided on the subject, went home without voting on it.[45]

When the Second Congress finally passed the Uniform Militia Act of 1792, it eliminated almost all the parts Washington and Knox considered crucial. The act lumped together all men between the ages of eighteen and forty-five in a huge, undifferentiated militia force, with every man responsible for securing his own weapon, regardless of its condition, unless the states elected to furnish arms. The law provided only loose guidelines for training and

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[43] Bickford and Bowling, *Birth of the Nation: The First Federal Congress, 1789-1791* (Madison, Wis., 1989), 82-83. For the satire on militia legislation see "C. to Mr. Bache," Philadelphia *General Advertiser*, Jan. 20, 1791; copy provided through the courtesy of Kenneth R. Bowling.

[44] *Documentary History First Congress*, 3:256-69 passim, 379, 484, 631-48 passim.

[45] First Congress militia debates, ibid., 14:48-189 passim.

organizing the militia under state, not federal, supervision. It provided no penalties if the states proved unwilling to enforce these guidelines.[46] The statute continued 'to be the basic structural legislation for the militia until the twentieth century, despite reform-minded efforts of various presidents. None made more persistent attempts than Thomas Jefferson, who addressed the matter in seven of his annual messages to Congress. Like Washington and Knox before him, Jefferson embraced the idea of Congress's classing the militia and supplying the best-trained component with standardized weapons. But when he persuaded lawmakers to consider the matter seriously in 1805-1806, he met a resounding defeat.[47]

Congress in 1792 also enacted the Calling Forth Act to define procedures for federalizing state militias. Some Federalists wanted to leave the decision to the president, but a majority of the lawmakers insisted on safeguards against hasty action by the administration. In the event of an insurrection against a state government, the act made it "lawful for the President . . . on the application of the legislature of such state, or the Executive (when the legislature cannot be convened)" to call out militia from other states. The new law also passed on some of Congress's power relative to executing national law to the

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[46] *Annals of Congress.* 2d. Congress, 1st Session, 103, 418-24, 436, 1392-95; *Statutes at Large,* 272.

[47] James D. Richardson, ed., *A Compilation of the Messages and Papers of the Presidents, 1789-1903*, 10 vols. (Washington, D.C., 1896-1899), 1:329, 345, 372, 385, 410, 428-29, 455: Paul Leicester Ford, ed., *The Writings of Thomas Jefferson*, 10 vols. (New York, 1892-1899), 8:409-12; *Annals of Congress*, 9th Congress, 1st Session, 69-70, 141, 327-30.

chief executive, mostly pertaining to when it was not in session. To act, however, the president needed notification from a federal judge that civil authority was inadequate to bring order. Furthermore, before ordering out militia, he had to issue a cease-and-desist proclamation.[48]

The first and greatest test case, practically and constitutionally, for the employment of the federalized militia came soon after Congress enacted the 1792 militia laws. In 1794, Washington called out 13,000 militiamen from four states to suppress the Whiskey Rebellion in western Pennsylvania, where angry farmers blocked the collection of a federal tax on distillers of spirituous liquors. Though Washington received criticism from within the emerging Republican Party, the protesters could hardly argue that the president had failed to remain inside the letter of the law; their concerns focused on the need to resort to force and the number of men taken into national service. Most congressmen, however, approved Washington's performance; he had delayed forceful means until after conciliation had apparently failed; he released most of the militiamen after a short time in arms; and he pardoned the two rebels convicted of treason.[49]

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[48] *Annals of Congress*, 2d Congress, 1st Session, 554-59, 574-80; 1 *Statutes at Large, 264.* See also for the 1792 militia legislation Robert W. Coakley, *The Role of Federal Military Forces in Domestic Disorders, 1789-1878* (Washington, D.C., 1988), 19-23, and John K. Mahon, *History of the Militia and the National Guard* (New York and London, 1983), 51-54.

[49] There is a sizable literature on the Whiskey Rebellion. Accounts of the martial dimensions are in Kohn, *Eagle and Sword, 157-73;* Coakley, *Role of Federal Military Forces*, chaps. 3-4; and Bennett Milton Rich, *The Presidents and Civil Disorder* (Washington, D.C., 1941), chap. 2. The subject is treated more broadly in Leland D. Baldwin, *Whiskey Rebels: The Story of a Frontier Uprising* (Pittsburgh,

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Congress subsequently reinforced and strengthened the "calling forth" authority of the federal government in general and of the president in particular. Revising the Calling Forth Act in 1795, it made the law permanent and deleted the stipulations that the president, before implementing part of it, had to obtain a judicial certificate and secure Congressional approval if the lawmakers were in session.[50] In 1799, President John Adams, displaying less hesitancy than Washington in 1794, dispatched federalized militia to put down Fries Rebellion in Pennsylvania where, again, an unpopular federal tax generated agrarian resistance. Even Jefferson, who had faulted both Washington and Adams for federalizing militia for use against Pennsylvania farmers, when president followed their lead during the Burr Conspiracy and again during the disorders stemming from his controversial Embargo in 1807.[51] Once the leaders of both political parties had turned to federalized militia, the question of employing that military force to maintain or restore domestic tranquility could hardly arouse as much dispute as a party issue as it had in the 1790s.

Remaining constitutional issues were resolved by the Supreme Court under Chief Justice John Marshall in the 1820s. From time to time, militia had been reluctant or unwilling to serve the federal government. President Jefferson had a greater problem in this respect than his predecessors, owing to the extreme unpopularity of the

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1939), and Thomas P. Slaughter, *The Whiskey Rebellion: Frontier Epilogue to the American Revolution* (New York, 1986).

[50] 1 *Statutes at Large*, 422.

[51] W.W.H. Davis, *The Fries Rebellion, 1798-99* (Doylestown, Pa., 1899); Coakley, *Role of Federal Military Forces*, 69-77.

Embargo in New England, and Federalists saw danger in Congress's enabling Jefferson to deploy both the army and the militia to enforce the Embargo. The Massachusetts legislature condemned Jefferson's assembling militia at the ports as "irregular, illegal, and inconsistent with the principles of the constitution . . . subversive of the militia system, and highly dangerous to the liberties of the people."[52] In *Houston v. Moore* (1820), the Supreme Court ruled that a militiaman who refused to respond to a federal call-up violated national law. Justice William Johnson, in a concurring opinion, found the central government empowered to stipulate "both the officer and private who shall serve, and to call him forth or punish him for not coming."[53] Even more sweeping was the court's unanimous decision in *Martin v. Mott* (1827) that, in the words of Justice Joseph Story, upheld the constitutionality of all portions of the Calling Forth Act of 1795. Addressing concerns about presidential tyranny, Story declared that it must be assumed that chief executives would demonstrate "public virtue and honest devotion to the public interests." He added that Congressional oversight and frequent elections would ever "guard against usurption or wanton tyranny."[54]

The settlement of constitutional questions about militia control hardly guaranteed that Americans would

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[52] *2 Statutes at Large*, 506. Massachusetts General Court, quoted in Coakley, *Role of Federal Military Forces*, 89. Jefferson's military enforcement of the Embargo is criticized in Levy, *Jefferson and Civil Liberties: The Darker Side* (Cambridge, Mass., 1963), chaps. 5-6, and viewed somewhat sympathetically in Dumas Malone, *Jefferson the President Second Term. 1805-1809* (Boston, 1974), chaps. 28, 32-35.

[53] 5 Wheat 1, 12-32, 37 (U.S., 1820).

[54] 12 Wheat, 19, 29-39 (U.S., 1827).

live comfortably with the outcome. Rather, a combination of laws and judicial opinions and the infrequency of federal militia call-ups explain why the militia-control issue in peacetime became moot. Since the time of Jefferson's Embargo, the central government has seldom assembled state units under its direction, and in every instance they have acted in conjunction with troops of the United States army.[55] For ninety years following the Civil War – from 1867 to 1957 – although often activated by a state to maintain order, the militia saw no federal service in internal disturbances. Beginning in the latter year and continuing into the next decade, the militia, by then known as the National Guard, performed short-term duty in enforcing racial integration in the South and restoring order in several northern cities racked by racial violence. Since the 1960s, the Guard's responsibilities have been carried out under state jurisdiction, with only a single two-day exception in Arkansas in 1980.[56]

The antifederalists lost the battle but, in a sense, won the war. They largely prevailed in that the federal government showed small interest in federalizing the militia for domestic reasons or in subjecting it to intensive training overseen by the national military establishment. Presidential administrations have not dispatched militiamen from

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[55] Coakley, *Role of Federal Military Force*, is a detailed account covering the years through Reconstruction, the first of a projected three-volume work on military interventions.

[56] Robin Higham, ed., *Bayonets in the Streets: The Use of Troops in Civil Disturbances*, 2d ed. (Manhattan, Kan., 1989), although comprehensive, focuses on post-Civil War activity. See also Jerry M. Cooper, "Federal Military Intervention in Domestic Disorders," in Kohn, ed., *The United States Military under the Constitution of the United States. 1789-1989* (New York, 1993), 120-50.

one end of America to the other or, typically, kept them on duty for more than a few days to a few months. With the major exception of the Civil War, federal law could normally be upheld and enforced by civil authorities and by the judiciary. Strong sentiments of localism and states' rights also are factors that worked against federalizing the militia and subjecting it to demanding training. So too is the fact that America hardly had an activist government in Washington, D. C., before the twentieth century.

Ironically, state control, a reality during by far the greater part of American history, failed to produce the positive results that its admirers predicted. Although Antifederalists feared that national authorities either would fail to train the militia or would remove it from the states, the truth is, as the Federalists maintained at the time, the states could train their militias above and beyond whatever regulation the central government imposed. The states have displayed scant initiative in providing substantial appropriations and rigorous training for their units – to the point that, by 1861, save for volunteer units (usually elitist in character), the state militias had virtually ceased to exist, especially in the South, and they revived but slowly after the Civil War.[57] The deterioration of the militias provides the explanation why, after the War of 1812, the federal government took into active service in time of national conflict very few militia units as such prior to the twentieth century, preferring instead to

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[57] Mahon, *History of the Militia and the National Guard*, chaps. 6, 8; Higginbotham, "The Martial Spirit in the Antebellum South; Some Further Speculations in a National Context," *J. Southern Hist.*, 58 (1992), 3-26; Kenneth Otis McCreedy, "Palladium of Liberty: The American Militia System, 1815-1861" (Ph. D. diss., University of California at Berkeley, 1991).

fight its wars with the regular army and federal volunteers.

Nor has state control insured that the militia would be the bulwark of liberty its proponents had claimed it to be from the time of seventeenth-century English opponents of the Stuarts through the colonial period and the Revolution to the Antifederalists and beyond. When called out by state authorities, the militia and the National Guard have often been accused of heavy-handed behavior against various minorities, including Catholics in antebellum cities, labor unionists, Native Americans, Asian Americans, African Americans, and Vietnam War protesters.[58]

The militia and National Guard never served as splendid repositories of freedom and equality. They were

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[58] Robert Reinders, "Militia and Public Order in Nineteenth-Century America," *Journal of American Studies*, 11 (1977), 81-101; Mahon, *History of the Militia and National Guard*, chaps. 6, 8, 16; Stephen E. Ambrose, "The Armed Forces and Civil Disorder," in Ambrose and James A. Barber, Jr., eds., *The Military and American Society: Essays and Readings* (New York, 1972), 241-48. Few state Guards displayed more partisan behavior than that of Colorado. See Alvin R. Sunseri, "The Ludlow Massacre: A Study in the Misemployment of the National Guard," *American Chronicle A magazine of History*, 2 (1972), 21-28; Clarence C. Clendenon, "Super Police: The National Guard as a Law Enforcement Agency in the Twentieth Century," In Higham, ed., *Bayonets in the Streets*, 90-91; George G. Suggs, Jr., *Colorado's War on Militant Unionism James H. Peabody and the Western Federation of Miners* (Detroit, 1972); and Alan M. Osur, "The Role of the Colorado National Guard in Civil Disturbances," *Military Affairs*, 46 (1982), 19-24. At least 3 Vietnam-era studies address the Guard's performance on the homefront. *Report of the National Advisory Committee on Civil Disorders* (New York, 1968), 497-506; American Civil Liberties Union, *The National Guard and the Constitution* (New York, n.d.); and Renata Adler, "A Reporter at Large," *The New Yorker*, 46 (Oct. 3, 1970), 40-64, which in some respects remains the most penetrating analysis of the Guard's domestic role at the time.

highly politicized instruments that reflected majoritarian views in the states, except during Reconstruction. Because governors or legislatures appointed general and staff officers, political affiliation became a critical factor in the selection process; this can be seen as early as 1802 in Tennessee when Andrew Jackson won the post of commanding general over John Sevier. The opportunity to be a member of the Guard has always been influenced by political factors. Just as some antebellum northern states limited participation to non-Irish whites, so blacks by 1900 had all but disappeared from the Guard in the southern states. Conversely, the Guard became a haven for countless young men seeking to avoid the draft during the Vietnam War, their ability to join often depending on their having political or social connections.[59]

Since the adoption of the Constitution in 1788, control of the militia has never been an either-or matter. It rarely received a call-up for peacetime domestic duty. Patrick Henry, who doubted that concurrent powers could work, was wrong, but for reasons he could not have foreseen, which have been enumerated in this essay. Rather than becoming

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[59] Mahon, *History of the Militia and National Guard*, chap. 8 passim, 149, 211, 236-37, 243, 246, 264; Willard B. Gatewood, Jr., "North Carolina's Negro Regiment in the Spanish-American War," *North Carolina Historical Review*, 48 (1971), 370-87. On none of the 4 major occasions the Guard was called out by state governors in the 1950s to deal with racial strife are blacks known to have served; W. Ronald Wachs, "Off Guard": The National Guard and Race Relations in the 1950s" (Ph. D. diss., University of North Carolina at Chapel Hill, 1977), 416. The political activities of the militia and National Guard, especially at the federal level, are developed in William H. Riker, *Soldiers of the States: The Role of the National Guard in American Democracy* (Washington, D. C. 1957)., and Martha Derthick, *The National Guard in Politics* (Cambridge, Mass., 1965).

agents of oppression in the name of the national government, as Antifederalists feared, the militia and National Guard have more often been agents of state-level discrimination against minorities, in acting against such elements, excluding them from joining the state forces, or both.[60]

James Madison, at the Constitutional Convention and in The Federalist No. 10, declared that personal rights were more likely to be endangered by the state governments than by the national government. That is why he included in his initial draft of the Bill of Rights in the House an amendment that "No state shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases." (Though this prohibition failed to gain the Senate's approval, Madison considered it "the most valuable amendment on the whole list.")[61] Hence, in still another way, the Antifederalists were mistaken in believing, as they did, that freedom was more secure in small, homogeneous republics. History vindicates Madison's new and daring counterargument of 1787: namely, that rights are more secure in large and diverse republics in which majorities are slow to form and thus have difficulty discriminating against minorities. The history of the militia and the National Guard, viewed from a comparison of their federal and state services, points in that direction.

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[60] Perhaps the harshest scholarly judgment is in Ambrose, "Armed Forces and Civil Disorder," 241-48.

[61] Veit, Bowling, and Bickford, eds., *Creating the Bill of Rights*, 13, 41, 41 n 59, 188.

Analysis of State Constitutional "Right to Keep and Bear Arms" Provisions

[Originally Prepared For American Bar Association Special Committee on Gun Violence, Second Amendment Program, ABA Annual Convention, 2003]

States (42) with constitutional "right to bear arms" provisions where the text specifically describes an individual right (by using words such as "person" "individual" "citizen") and/or where the courts have interpreted the provision to protect an individual right (key provided on page 2):

Maine *
Vermont =
New Hampshire**
Connecticut*
Delaware=
Pennsylvania*
Virginia= upheld ordinance requiring permit for handgun purchase
West Virginia*
Ohio!*
Georgia*
North Carolina*
South Carolina=
Florida*
Kentucky*
Tennessee*right to exercise police power to regulate "wearing" of arms; right to keep arms a private right, right to bear arms a political right
Alabama*
Michigan*
Indiana*
Mississippi*
Wisconsin!*
Illinois*

Missouri*
Arkansas*
Louisiana*
Nebraska*
Oklahoma*
Texas*
Montana!=
Wyoming*
Colorado*
New Mexico*
Idaho – the constitutional provision states what regulations are acceptable
Utah* prior clause, new clause states nothing herein shall prevent Legislature from defining the lawful use of arms
Arizona*
Oregon*
Nevada, individual right, no cases
Alaska **
Hawaii*
South Dakota=
North Dakota*
Washington*
Rhode Island (right to keep arms is individual right)*

Key:

* courts have used a reasonableness test in determining whether a regulation infringes impermissibly on the right
! courts have explicitly held the right is fundamental
** courts have explicitly held the right is subject to regulation provided the restriction narrowly serves a significant state interest
= courts have held the right is not absolute or unlimited but have not yet defined level of scrutiny

42 states with provisions protecting individual right to possess firearms; in 32 of these the courts have held the right is subject to reasonable regulation in the exercise of the state's police power, including in Ohio and Wisconsin where the courts have also held explicitly that the right is fundamental, and in Colorado where the state supreme court stated it was unnecessary to decide if the right is fundamental, it is subject to reasonable regulation; in 7 of these states the courts have held the right is not absolute but have not defined level of scrutiny; in 2 states, Alaska and New Hampshire, the courts have required a narrow means/substantial state interest test

The following states do not have a state constitutional right to bear arms clause:

California
Iowa
New York
New Jersey
Maryland
Minnesota

The following states have a constitutional right to bear arms or militia clause interpreted as collective, militia-based:

Massachusetts
Kansas

Specific provisions and relevant case law now found at http://www.firearmslawcenter.org

Supreme Court, U.S.
FILED
SEP 20 2004
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No. 03 – 1707

In The

Supreme Court of the United States

RUSSELL ALLEN NORDYKE, *et al.*, Petitioners,

vs.

MARY V. KING, *et al.*, Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONERS' REPLY BRIEF RE: PETITION FOR A WRIT OF CERTIORARI*

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* The Conference in this matter is set for September 27, 2004.

QUESTIONS PRESENTED

1. Do individuals have standing to litigate any rights under the Second Amendment to the United States Constitution?

2. Can the individual rights guaranteed by the Second Amendment to the United States Constitution be enforced against infringements by state and local governments?

3. Does a county ordinance prohibiting the possession of firearms at gun shows held at a county fairgrounds, in contexts that involve core political, educational and social speech, abridge rights under the First Amendment to the United States Constitution?

STATEMENT PURSUANT TO RULES 14.1(b) & 29.6

All parties are set forth in the caption.

T S TRADE SHOWS is the business name used by RUSSELL and SALLIE NORDYKE to conduct business as gun show promoters throughout Northern and Central California. The business is wholly owned by the Nordykes.

Petitioner VIRGIL McVICKER is president of the MADISON SOCIETY, a Nevada Corporation with its registered place of business in Carson City, Nevada. The Madison Society has chapters throughout California. The society is a membership organization whose purpose is preserving and protecting the legal and constitutional right to keep and bear arms for its members and all responsible law-abiding citizens. It is not a publicly traded corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully submit this Reply Brief in support of their Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

PROCEDURAL ISSUES RAISED BY RESPONDENTS' BRIEF IN OPPOSITION

At least part of Respondents' arguments appear to have become infected with the same childish style now used by political candidates during this political season, otherwise known as the "liar, liar, pants on fire" argument.

Respondents complain in footnote 1 of their Brief In Opposition that Petitioners are attempting to engage in skullduggery by attempting to "bootstrap" facts into the appellate record. This same complaint was raised in both the Ninth Circuit and the California Supreme Court when Respondents filed motions to strike portions of Petitioners' Excerpt of Record based upon the same theories. The Respondents admit that neither court ruled on those motions.

Instead of accepting the legally operative fact that motions not ruled upon in a timely fashion are deemed denied, Respondents choose instead to impugn the integrity of Petitioners' counsel.

The mudslinging continues when Respondents accuse Petitioners of making misstatements of fact in our Petition. [See Respondents' Brief, pg. 1]

This would indeed be a serious charge were it true. However, a careful reading of the Petition's statement of facts along side Judge O'Scannlain's statement of facts from the OPINION AND ORDER OF UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT AFFIRMING DISTRICT COURT'S ORDER DENYING PLAINTIFFS'

MOTION FOR INJUNCTIVE RELIEF [Pet. App. 1] will reveal that Petitioners' counsel "borrowed" liberally most of the exact language in its statement of facts from that opinion.

Respondents cannot (and did not) cite to any statement of fact contained in the Petition that is was not also set forth in any of the various opinions of the Courts that have heard this matter.

Nor does a fair reading of the opinions below reveal that those judges were misled into believing that the Ordinance applied throughout Alameda County, instead of just on county property, as was argued in Respondents' footnote 3.

The dissenting opinion in the ORDER DENYING REHEARING EN BANC: UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT [Pet. App. 22, 26] clearly states:

> [A]ppellants in Nordyke challenged a local ordinance prohibiting the possession of all firearms on county property, which had the effect of foreclosing a traditional gun show.

An additional challenge to Petitioners' veracity is made in Respondents' footnote 12, which implies that Petitioners' counsel misled this Court by suggesting that the Ninth Circuit Panel in this case *sua sponte* called for briefing the Second Amendment issues.

The quote referred to in footnote 12 (from page 5) of the Petition is read out of context. At the top of page 4 of the Petition, it is clearly stated that: "Nordykes sought permission to brief Second Amendment issues."

Perhaps if the Respondents had stuck to the law of the case as authored by the various judges in this case, they would not have violated Rule 14.1(a) by raising new questions not set forth in the Questions Presented for this Court's consideration in the Petition.

SUBSTANTIVE ISSUES RAISED BY RESPONDENTS' BRIEF IN OPPOSITION

The fact that: "Judges O'Scannlain and Gould voted to grant the petition for rehearing en banc, and Judge Alarcon so recommended." [Pet. App. 22] already speaks volumes. Only a request for certification under Rule 19 could have been a stronger endorsement of the issues presented by the Petitioners in their request for a Writ of Certiorari.

Since Respondents did Petitioners the favor of including our PETITION FOR REHEARING *EN BANC* AND PANEL REHEARING in their appendix [See Resp. App. 34], Petitioners are reluctant to burden this Court with any more substantive arguments in this reply that are not already contained in that document. This very brief reply will address the only new issue raised by Respondents' Brief in Opposition.

It is irrelevant that Petitioner/Plaintiffs did not plead a Second Amendment cause of action in their verified complaint.

Petitioners have never hidden the fact that no specific Second Amendment cause of action was set forth in their verified complaint. But claims can be implied from the facts which are alleged. It is not always necessary to specify the precise nature of the claim asserted as long as the facts alleged put defendant on notice thereof. [See: *Self Directed Placement Corp. v. Control Data Corp.* (9th Cir. 1990) 908 F.2d 462, 466]

There is also the fact that the District Court Judge [Jenkins] raised the Second Amendment standing issue *sua sponte* in his order denying injunctive relief. [Pet. App. 62, 63].

Nor does it help that the Second Amendment standing issues were not argued to the Ninth Circuit until late in the litigation. District court standing may be addressed *sua sponte* at any time by an appellate court. [See: *FW/PBS, Inc. v. City of*

Dallas, 493 U.S. 215, 230-231, 110 S.Ct. 596, 607-608 (1990); *Washington Legal Found. v. Legal Found. of Washington*, 271 F.3d 835, 847 (9th Cir. 2001); and *B.C. v. Plumas Unified School Dist.*, 192 F.3d 1260, 1264 (9th Cir. 1999) -- "federal courts are required *sua sponte* to examine jurisdictional issues such as standing"]

Therefore the only real issue raised with respect to whether the Second Amendment standing issues are properly before this Court are the "irreducible minimum standing" requirements as set forth in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561, 112 S.Ct. 2130, 2136 (1992) and *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 180-181, 120 S.Ct. 693, 704 (2000).

Petitioner must have suffered an injury in fact as a result of the district court's decision -- an invasion of a legally protected interest that is (i) concrete and particularized, and (ii) actual or imminent, not conjectural or hypothetical. In this case Judge O'Scannlain's opinion [Pet. App. 2] found that:

> The Ordinance would forbid the presence of firearms at gun shows, such as Nordyke's, held at the Fairgrounds. As a practical matter, the Ordinance makes it unlikely that a gun show could profitably be held there.

Second, there must be a causal connection between the injury and the conduct complained of. Judge Kleinfeld [Pet. App. 24] wrote:

> In this case, by contrast, the result might well have been different if we had not erased the Second Amendment. The ordinance at issue, subject to narrow exceptions, criminalizes any and all possession of firearms on county property. The case before the panel was about apparently law-abiding persons wanting to hold a gun show at a fairgrounds.

Finally, there must be a likelihood of success, as opposed to mere speculation, that petitioner's injury will be redressed by a favorable decision. Judge Gould opined [Pet. App. 26]:

> [A]ppellants in Nordyke challenged a local ordinance prohibiting the possession of all firearms on county property, which had the effect of foreclosing a traditional gun show. Some may consider that the regulation of assault weapons may implicate too many difficult considerations beyond that of whether the Second Amendment confers an individual or collective right. The ordinance at issue in Nordyke, if it must be tested in light of an individual Second Amendment right, will not raise the same concerns. If the Second Amendment confers an individual right, then the Nordyke gun possession ban presents a better context in which our court might have assessed the constitutionally permissible bounds of gun regulation.

These are the standard Article III standing issues, however this case is about more than just the issue of justiciability. If "the people" set forth in the Second Amendment have no standing to assert claims under that Amendment, then this Court needs to give an explanation to the "the people" defined by the First, Fourth, Ninth and Tenth Amendments as to what differences exist between these two classes of persons.

The rest of Respondents' Brief in Opposition reads more like a brief on the merits. If they wish to make those arguments, this Court should oblige them and grant certiorari.

It bears emphasis that this case is on appeal from a request for pre-trial injunctive relief. It is apparent that at least the First Amendment claims must go on to be litigated in an "as applied"

challenge in the District Court[1]. Since that may necessitate further amendments to the pleading, Petitioners should be permitted to amend their claims to include a Second Amendment Cause of Action based upon legal principles arising out the Fifth Circuit in *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001) and the various concurring and dissenting opinions in *Silveira v. Lockyer*, 312 F.3d 1094 (9th Cir. 2002), *Nordyke v. King*, 319 F.3d 1185, (9th Cir. 2003) and *Nordyke v. King*, 364 F.3d 1025 (9th Cir. 2004).

Current Ninth Circuit law precludes individuals from invoking Second Amendment standing. Rather than requiring the Petitioners to go back and plead Second Amendment claims in a good faith attempt to challenge the Ninth Circuit's Second Amendment standing rules, this Court should settle the standing issue once and for all right here and now. Then as Judge Gould stated [Pet. App. 19]:

> We would make progress if the Supreme Court were to establish a doctrine of an individual Second Amendment right subject to reasonable government regulation. The decisional chips would thereafter fall where they may on the basis of particular cases and the delicate balance of their precise facts, aided by the complementary efforts of lawyers, scholars and judges. The law would best put aside extreme positions and adopt an assessment of reasonableness of gun regulation, for this would place us on the right track. [Footnotes omitted]

Only a grant of certiorari and an order permitting Petitioners to raise Second Amendment claims would permit this process to go forward.

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[1] Unless this Court summarily reverses on the First Amendment issue raised in the Petition.

CONCLUSION

Here are two passages from an infamous case in which this Court attempted to interpret what it means to be a citizen and/or person (alternate concepts of the term of art "the People") with standing to invoke the protections of the United States Constitution and its Amendments. [emphasis is added]

> It would give to persons of the negro race, who were recognized as citizens in any one State of the Union, the right to enter every other State whenever they pleased, singly or in companies, without pass or passport, and without obstruction, to sojourn there as long as they pleased, to go where they pleased at every hour of the day or night without molestation, unless they committed some violation of law for which a white man would be punished; and it would give them the full liberty of speech in public and in private upon all subjects upon which its own citizens might speak; to hold public meetings upon political affairs, **and to keep and carry arms wherever they went**. And all of this would be done in the face of the subject race of the same color, both free and slaves, and inevitably producing discontent and insubordination among them, and endangering the peace and safety of the State.

And:

> **Nor can Congress deny to the people the right to keep and bear arms**, nor the right to trial by jury, nor compel any one to be a witness against himself in a criminal proceeding.
>
> These powers, and others, in relation to rights of person, which it is not necessary here to

enumerate, are, in express and positive terms, denied to the Goneral [sic] Government; and the rights of private property have been guarded with equal care. Thus the rights of property are united with the rights of person, and placed on the same ground by the fifth amendment to the Constitution, which provides that no person shall be deprived of life, liberty, and property, without due process of law. And an act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offence against the laws, could hardly be dignified with the name of due process of law.

So, too, it will hardly be contended that Congress could by law quarter a soldier in a house in a Territory without the consent of the owner, in time of peace; nor in time of war, but in a manner prescribed by law. Nor could they by law forfeit the property of a citizen in a Territory who was convicted of treason, for a longer period than the life of the person convicted; nor take private property for public use without just compensation.

The powers over person and property of which we speak are not only not granted to Congress, but are in express terms denied, and they are forbidden to exercise them. And this prohibition is not confined to the States, but the words are general, and extend to the whole territory over which the Constitution gives it power to legislate, including those portions of it remaining under Territorial Government, as well

> as that covered by States. It is a total absence of power everywhere within the dominion of the United States, and places the citizens of a Territory, so far as these rights are concerned, on the same footing with citizens of the States, and guards them as firmly and plainly against any inroads which the General Government might attempt, under the plea of implied or incidental powers. And if Congress itself cannot do this -- if it is beyond the powers conferred on the Federal Government -- it will be admitted, we presume, that it could not authorize a Territorial Government to exercise them. It could confer no power on any local Government, established by its authority, to violate the provisions of the Constitution.
>
> It seems, however, to be supposed, that there is a difference between property in a slave and other property, and that different rules may be applied to it in expounding the Constitution of the United States. And the laws and usages of nations, and the writing of eminent jurists upon the relation of master and slave and their mutual rights and duties, and the powers which Governments may exercise over it, have been dwelt upon in the argument.

The case, of course, is *Dred Scott v. Sanford*, 60 U.S. 393 (1856). These arguments were used to bolster the proposition that a black man who had been [still was?] a slave did not have standing to pursue a "due process of law" claim under the United States Constitution.

This Court in 1856 made a mistake that took a civil war and passage of the Fourteenth Amendment to rectify. That mistake came from an attempt to reify a concept which does not exist under current law:

> *The idea of a man born in this country who is neither citizen, person nor one of "the people" protected by our Constitution and its Amendments.*

The current law on Second Amendment standing in the Ninth Circuit[2] makes a corollary mistake. The rule creates a non-entity. It creates a class of "the people" who have a "right to keep and bear arms", who nevertheless have no standing to invoke that right.

Only this Court sitting in 2004/2005 can rectify that mistake by granting certiorari and issuing an order that individuals do have standing to raise and litigate rights under the Second Amendment to the United States Constitution.

Respectfully submitted,

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[2]And since the California State Constitution has no "right to keep and bear arms" in its state constitution, that means all the citizens of California.

(2)

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No. 03-1707

IN THE

Supreme Court of the United States

RUSSELL ALLEN NORDYKE, *et al.*,

Petitioners

v.

MARY V. KING, *et al.*,

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF AMICUS CURIAE OF THE NATIONAL RIFLE ASSOCIATION OF AMERICA, INC., IN SUPPORT OF PETITIONERS AND IN SUPPORT OF REVERSAL

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QUESTION PRESENTED

Do the individual rights guaranteed by the Second Amendment to the United States Constitution apply through the Fourteenth Amendment to the States?

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STATEMENT OF INTEREST OF AMICUS CURIAE[1]

The National Rifle Association of America, Inc. ("NRA") is a New York not-for-profit membership corporation founded in 1871. NRA has 4.2 million individual members and 10,700 affiliated members (clubs and associations) nationwide. NRA's purposes, as set forth in its Bylaws, include the following:

> To protect and defend the Constitution of the United States, especially with reference to the inalienable right of the individual American citizen guaranteed by such Constitution to acquire, possess, transport, carry, transfer ownership of, and enjoy the right to use arms, in order that the people may always be in a position to exercise their legitimate individual rights of self-preservation and defense of family, person, and property, as well as to serve effectively in the appropriate militia for the common defense of the Republic and the individual liberty of its citizens . . . .

NRA's interest in this case stems from the fact that large numbers of NRA members reside in the States encompassed within the Ninth Circuit and will be affected by

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[1] Pursuant to Supreme Court Rule 37.6, *Amicus Curiae* states that no counsel for any party to this dispute authorised this brief in whole or in part and no person or entity other than *Amicus Curiae* made a monetary contribution to the preparation or submission of this brief. The parties have orally consented to the filing of this brief; written consents will be filed upon receipt.

any ruling this Court may make concerning the meaning of the right of the people to keep and bear arms as provided in the Second Amendment and whether this right is protected from State infringement under the Fourteenth Amendment.

ARGUMENT

INTRODUCTION

This case concerns the validity of Alameda County Code § 9.12.120(b), which provides: "Every person who brings onto or possesses on County property a firearm, loaded or unloaded, or ammunition for a firearm is guilty of a misdemeanor." Petitioners challenged this prohibition as a violation of the First Amendment right to free speech based on the legislative motive to ban gun shows and the Second Amendment right to keep arms as applied to the States by the Fourteenth Amendment. A panel of the court of appeals upheld the ordinance, concluding that it was bound by the prior panel decision in *Hickman v. Block*, 81 F.3d 98 (9th Cir. 1996), *cert. denied*, 519 U.S. 912 (1996), which held that the right to "bear arms" is not an individual right. Despite the right to "keep" arms not being an issue in *Hickman*, the panel in the case at bar viewed its holding as extending to the right to "keep" arms.

Further, although the panel in the instant case did not reach the Fourteenth Amendment issue, the Ninth Circuit, in a prior panel decision, *Fresno Rifle & Pistol Club v. Van de Kamp*, 965 F.2d 723 (9th Cir. 1992), held that the Second Amendment is not incorporated into the Fourteenth Amendment. Thus, the panel in the case at bar would have been bound by that decision.

While *amicus curiae* NRA agrees that the ordinance violates the First Amendment right to free speech as applied to the States by the Fourteenth Amendment, this brief is limited to whether the Second Amendment applies to the States through the Fourteenth Amendment.

THE SECOND AMENDMENT APPLIES TO THE STATES THROUGH THE FOURTEENTH AMENDMENT

Fresno Rifle & Pistol Club v. Van de Kamp, 965 F.2d 723 (9th Cir. 1992), held that the Second Amendment is not incorporated into the Fourteenth Amendment so as to protect the right to keep and bear arms from State infringement. While there is no conflict between the circuits on this issue, the issue of applicability of the Second Amendment to the States through the Fourteenth Amendment is an important question of federal constitutional law that has not been, but should be, settled by this Court.

Fresno Rifle & Pistol Club is flawed in two respects. First, while this Court has held that the Bill of Rights does not *directly* apply to the States, this Court has left open the question whether the Fourteenth Amendment protects the right to keep arms as guaranteed by the Second Amendment against State infringement. Second, *Fresno Rifle & Pistol Club* ignores the fact that over two-thirds of the same Congress that passed the Amendment declared that the rights to "personal liberty" and "personal security" include "the constitutional right to bear arms."

In *Miller v. Texas*, 153 U.S. 535, 538-39 (1894), this

Court noted that, "if the Fourteenth Amendment limited the power of the States as to such rights [*i.e.*, the rights to bear arms and against warrantless searches] as pertaining to citizens of the United States, we think it was fatal to this claim that it was not set up in the trial court." This Court would not hear assignments of error not timely made in the court below. *Id.*

Miller v. Texas held that the Second and Fourth Amendments did not *directly* apply to the states. *Id.* at 538, citing *Barron v. Baltimore*, 32 U.S. 243, 250-51 (1833) (Fifth Amendment just-compensation clause did not apply directly to States) and *United States v. Cruikshank*, 92 U.S. 542, 552-53 (1876) (stating in *dictum* that "the first amendment . . . was not intended to limit the powers of the State governments . . . but to operate upon the National government alone"; same with Second Amendment).[2] *Presser v. Illinois*, 116 U.S. 252 (1886), held that a prohibition on unlicensed armed parades in cities and towns "do[es] not infringe the right of the people to keep and bear arms," adding in *dictum* that the First and Second Amendments are "a limitation only upon the power of Congress and the National Government, and not upon that of the states." 116 U.S. at 265. *Cruikshank* and *Presser* did not address whether the Fourteenth Amendment incorporates the

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[2] *Fresno Rifle & Pistol Club* cites *Cruikshank* as having "held" that the Second Amendment does not constrain the States. 965 F.2d at 729. Yet no State action was even involved in *Cruikshank*, which concerned the prosecution of *private individuals* for violation of freedmen's rights to assemble and bear arms. 92 U.S. at 544-45. *Cruikshank* held that private action was not constrained by the Fourteenth Amendment. *Cruikshank's* comment about the First Amendment (and hence the Second) was "*dictum*." *Collins v. Handyman*, 341 U.S. 651, 660 (1950).

First and Second Amendments so as to limit state action.[3]

Fresno Rifle & Pistol Club held that *Cruikshank* and *Presser* applied even though they mention only the *direct* application of the First and Second Amendments to the States. It stated that, since *Miller v. Texas* predated the first incorporation case,[4] "there is no reason to believe that *Miller* left open the incorporation question any more than *Cruikshank* or *Presser*." 965 F.2d at 730. Yet *Miller v. Texas* explicitly stated that it is *not* deciding whether the Fourteenth Amendment protects the right to keep and bear arms. 153 U.S. at 538.

The Fifth Circuit in *Emerson v. United States*, 270 F.3d 203 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 2362 (2002)

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[3] *Presser* did observe, however, that:

> It is undoubtedly true that all citizens capable of bearing arms constitute the reserved military force or reserve militia of the United States as well as of the States, and in view of this prerogative of the general government, as well as of its general powers, *the States cannot, even laying the constitutional provisions in question out of view, prohibit the people from keeping and bearing arms, so as to deprive the United State of their rightful resource for maintaining the public security and disable the people from performing their duty to the general government.*

116 U.S. at 265.

[4] *Chicago, B.& Q.R. Co. v. Chicago*, 166 U.S. 226 (1897).

commented:

> As these holdings all came well before the Supreme Court began the process of incorporating certain provisions of the first eight amendments into the Due Process Clause of the Fourteenth Amendment, and as they ultimately rest on a rationale equally applicable to all those amendments, none of them establishes any principle governing any of the issues now before us.

270 F.3d at 221 n.13.

In *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 847 (1992), this Court seemingly agreed that the right to keep arms was protected by the Fourteenth Amendment when it rejected the view that, in determining what rights were protected by the Fourteenth Amendment, "liberty encompasses no more than those *rights already guaranteed to the individual* against federal interference *by the express provisions of the first eight Amendments* to the Constitution." (emphasis added). Given that the Second Amendment guarantees an individual right,[5] it would be illogical not to incorporate it into the

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[5] See *e.g.*, *Emerson*, *supra*; *Runnebaum v. NationsBank of MD*, 123 F.3d 156, 176 (4th Cir. 1997) (*en banc*)("*individuals* have the constitutional right to peaceably assemble, *see* U.S. Const. amend. I; and to 'keep and bear Arms,' U.S. Const. amend. II."); *Gilbert Equipment Co., Inc.* v. *Higgins*, 709 F. Supp. 1071 (S.D. Ala. 1989), *aff'd*, 894 F.2d 412 (11th Cir. 1990) (*mem*)(Second Amendment "guarantees to all Americans 'the right to keep and bear arms'"); *United States* v. *Swinton*, 521 F.2d 1255 (10th Cir.

Fourteenth Amendment as this Court has done with other guarantees of the Bill of Rights.

The second major flaw in *Fresno Rifle & Pistol Club* is that it rejected the rule that "in interpreting a constitutional provision, the fundamental principle of construction is to give the provision the effect intended by the framers and the people adopting it." *Tom v. Sutton*, 533 F.2d 1101, 1105 (9th Cir. 1976). This Court "has not hesitated to re-examine past decisions according the Fourteenth Amendment a less central role in the preservation of basic liberties than that which was contemplated by its Framers when they added the Amendment to our constitutional scheme." *Malloy v. Hogan*, 378 U.S. 1, 5 (1964).

Fresno Rifle & Pistol Club disregarded these principles by refusing to consider "remarks by various legislators during passage of the Freedmen's Bureau Act of 1866, the Civil Rights Act of 1866, and the Civil Rights act of 1871." 965 F.2d at 730. Further, far more was involved than "remarks." For instance, Senator Jacob M. Howard, in introducing the Fourteenth Amendment to the Senate in 1866, referred to:

1975)("there is no *absolute constitutional right of an individual* to possess a firearm"); *United States* v. *Day*, 476 F.2d 562 (6th Cir. 1973)("there is no *absolute* right of an individual to possess a firearm"); *United States* v. *Wiley*, 309 F.Supp. 141, 145 (D. Minn.), *aff'd*, 438 F.2d 773 (8th Cir. 1971)(felons are "a separate class whose *individual right* to bear arms may be prohibited"); and *Cases* v. *United States*, 131 F.2d 916 (1st Cir. 1942), *cert. den. sub nom.*, *Velazquez* v. *United States*, 319 U.S. 770 (1943)(federal statute "undoubtedly curtails to some extent *the right of individuals* to keep and bear arms").

> the personal rights guaranteed and secured by the first eight amendments of the Constitution; such as . . . the right to keep and bear arms. . . . The great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees.

Quoted in *Duncan v. Louisiana*, 391 U.S. 145, 166-67 (1968) (Black, J., concurring).

See also S. Halbrook, *Freedmen, the Fourteenth Amendment, and the Right to Bear Arms, 1866-1876* (Praeger Publishers, 1998); A. Amar, "The Bill of Rights and the Fourteenth Amendment," 101 YALE L.J. 1193, 1242-45, 1261-66 (1992);R. Cottrol & R. Diamond, "The Second Amendment: An Afro-Americanist Reconstruction," 80 GEORGETOWN L.J., No. 2, 309, 342-49 (1991).

The same two-thirds of Congress which passed the Fourteenth Amendment also enacted a statute protecting from State infringement the "full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and . . . estate, real and personal, including the constitutional right to bear arms". Freedmen's Bureau Act, §14, 14 Stat. 176 (1866). *See Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 397-98 (1978) (opinion of Marshall, J.) (rights set forth in the Freedmen's Bureau Act were dispositive of Congress' intent in Fourteenth Amendment).

The Fourteenth Amendment protects from state infringement the "indefeasible right of personal security,

personal liberty and private property." *Griswold v. Connecticut*, 381 U.S. 479, 485 n. (1965). No state may commit "a violation of [the] constitutional right to personal security, a liberty interest protected by the fourteenth amendment." *Wood v. Ostrander*, 879 F.2d 583, 591 (9th Cir. 1989). *See also United States v. Verdugo-Urquidez*, 856 F.2d 1214, 1220 (9th Cir. 1988), *rev'd on other grounds* 494 U.S. 259 (1990) ("The absolute rights of individuals may be resolved into the right of personal security, the right of personal liberty, and the right to acquire and enjoy property.") (quoting 2 J. Kent, COMMENTARIES 1 (1827)).

In light of the above, it must be concluded that the Ordinance, by prohibiting mere possession of a firearm on County property, violates the right to keep arms, a right embodied in the right to personal security, guaranteed by the Second Amendment as applied to the states by the Fourteenth Amendment.

CONCLUSION

The Court should grant Petitioners' petition for a writ of certiorari.

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